

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 December 2024

DOCKET NUMBER: AR20240002197

APPLICANT REQUESTS:

- retroactive promotion to the rank/grade of sergeant first class (SFC)/E-7
- removal of the Relief for Cause DA Form 2166-9-2 (Noncommissioned Officer Evaluation Report (SSG-1SG/MSG))
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DA Forms 268 (Report to Suspend Favorable Personnel Actions (Flag)
- Reserve Component Management System (RCMS) information
- Fiscal Year (FY) 2019 Active Guard/Reserve (AGR) SFC Considered and Selected List

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states in pertinent part that in 2019, he was selected for promotion to SFC, but was unable to be promoted due to unfounded allegations. In result of the allegations, he was flagged and the action to remove him from the AGR program was initiated. In March 2021, the Criminal Investigation Department (CID) reopened the investigation into his former allegations based upon the availability of new evidence. He contests that in August of 2021, his records were sent before a Standby Advisory Board (STAB) which further resulted in his name being removed from the promotion selection list. In September 2021, the CID released their findings, and the former charges were overturned. He notes that upon receipt, he requested removal of his flag, but his newly assigned Human Resources Specialist was unfamiliar with the removal process for AGR personnel. This delayed his enrollment in the Senior Leader Course (SLC) to the point where he requested the assistance of the Inspector General's Office. His flag was

subsequently removed, and he was able to attend and complete SLC. As such, he would like to be promoted to SFC based upon his initial selection and the Relief for Cause DA Form 2166-9-2 removed from his records because the formerly substantiated charges have since been overturned.

3. A review of the applicant's available service records reflects the following:

a. On 26 January 1998, the applicant enlisted in the U.S. Army Reserve with duty as a 75B (Personnel Administration Specialist).

b. On 3 June 2013, the U.S. Army Human Resources Command (AHRC) issued Orders Number R-06-383978 ordering the applicant to active duty in the AGR program, effective 10 June 2013.

c. On 11 June 2013, AHRC issued Orders awarding the applicant 79R (Recruiter) Military Occupational Specialty (MOS), effective 10 June 2013.

d. On 28 July 2014, the U.S. Army Recruiting Command issued Orders promoting the applicant to the rank/grade of staff sergeant (SSG)/E-6, effective 1 August 2014.

e. On or about 11 December 2019, the applicant received a Relief for Cause DA Form 2166-9-2 for the period 11 December 2018 through 17 April 2019. Specifically, his rater stated in:

(1) Part IIIc (Character) the applicant failed to live up to the Army Values and places no moral emphasis on the Warrior Ethos.

(2) Part IVf (Leads) the applicant exercised poor judgement while on duty; violated the U.S. Army Recruiting Command (USAREC) standards of conduct. questionable leadership ability, failed to set the example for junior Noncommissioned Officers and Soldiers

(3) Part IVi (Rater Overall Performance) removed from position of trust and authority by USAREC Commanding General for inappropriate behavior with an applicant joining the United States Army; no longer able to serve as a recruiter and has been relieved by rater. Soldier has been notified for the reason behind the relief in writing; probable cause existed to believe the applicant attempted to develop an inappropriate relationship with an applicant, violating USAREC regulations and policy.

(4) Part V (Senior Rater Overall Potential) he was removed from positions of significant trust and authority and is unable to serve as a recruiter in the United States Army. He is being relieved for cause by rater following substantiated inappropriate behavior with an applicant.

(5) Part Va “not qualified.”

(6) The evaluation is void of mention of comments enclosed.

f. The applicant’s records are void of a commander’s inquiry or comments pertaining to the relief for cause evaluation.

g. On 12 October 2021, AHRC issued Orders Number B-10-105476, announcing the applicant’s award of the 31B (Military Policeman) MOS, effective 12 October 2021.

h. On 24 May 2023, the applicant completed SLC.

4. The applicant provides the following a:

a. DA Forms 268 dated 27 March 2018, reflective of the applicant being flagged effective 27 March 2018 due to a law enforcement investigation.

b. DA Form 268 dated 24 April 2019, reflective of the applicant’s flag being removed effective 24 April 2019; final action is neither favorable nor unfavorable.

c. Reserve Component Management System (RCMS) information reflective of information pertaining to the applicant’s flagging action history. On 27 March 2018, the applicant was flagged (24 April 2019 expiration date); Headquarters Department of the Army initiated flag on 15 December 2019; 18 August 2021 expiration date/removed from selection list.

d. FY 2019 AGR SFC Considered and Selected List, reflective of the applicant being selected for promotion to SFC.

5. On 7 November 2024, the AHRC, Chief, Senior Enlisted Promotions, Promotion Branch provided an advisory opinion noting that the applicant’s record went before a STAB for retention or removal from the FY19 SFC Promotion Board based on the Relief for Cause evaluation, not based upon the request of his personnel staff. He was removed from the promotion list and therefore is not eligible for any backdated promotion based on that removal. The applicant is currently not flagged and was last evaluate for promotion during the FY24 Promotion Board.

6. On 3 December 2024, the applicant was provided with a copy of the advisory opinion and afforded 7 days to provide comments. On 7 December 2024, the applicant responded to the advisory opinion noting that the underlying issue resulting in the administrative flag and the Relief for Cause NCOER was reviewed by CID and his command. The applicant contests that his commander determined that there was insufficient evidence for all allegations and that no action would be taken against him.

After further investigation, the applicant again notes that there was insufficient evidence and the claims against him were completely baseless. In result, all negative actions were ordered to be reversed. Therefore, the applicant contests that the DA Form 2166-9-2 (Relief for Cause) should have been removed from his record prior to the publishing of the FY21 Removal Board results. This document is further provided in its entirety for the Board members review within the supporting documents.

#### BOARD DISCUSSION:

1. The Board determined 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.

2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence of record shows the applicant's rating officials determined the applicant failed to live up to the Army Values and placed no moral emphasis on the Warrior Ethos, exercised poor judgement while on duty; violated the U.S. Army Recruiting Command standards of conduct; exhibited questionable leadership ability, and failed to set the example for junior NCOs and Soldiers. As a result, he was relieved from his position and received a Relief for Cause NCO Evaluation Report for the period 11 December 2018 through 17 April 2019. He was also removed from the promotion list.

a. NCO Evaluation Report removal: Grant. The Board found no evidence the applicant requested a commander's inquiry or timely appealed his RFC NCOER through the appropriate channels. However, the Board noted that the underlying issue resulting in the applicant's administrative flag and the Relief for Cause NCOER was reviewed by CID and his command. His commander determined that there was insufficient evidence for all allegations and that no action would be taken against him and that all negative actions were ordered to be reversed. The Board agreed with the applicant that the contested NCOER should be removed and replaced by a non-rated statement.

b. Promotion to SFC: Partial Grant. The applicant contends that his promotion should be backdated to the time he was supposed to be promoted and to have his RFC NCOER removed from his record. Currently, his RFC NCOER is still in his official AMHRRs. Also, he is not eligible for a backdated promotion. The Board reviewed and agreed with the AHRC advisory official's determination that based on his RFC in his official record, the applicant's record was put in front of a STAB board for retention or removal from the FY19 SFC Promotion Board. He was removed from the promotion list and therefore is not eligible for any backdated promotion based on that removal.

However, since the Board now determined the RFC NCO Evaluation Report should be removed, the applicant's records should be considered by a STAB for potential promotion to SFC.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by:
  - Removing the Relief for Cause DA Form 2166-9-2 (Noncommissioned Officer Evaluation Report (SSG-1SG/MSG)) for the rating period 11 December 2018 through 17 April 2019 and replacing it with a non-rated statement
  - Submitting the applicant's records before a Standby Advisory Board for promotion consideration to SFC/E-7, at the earliest year eligible
2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to any relief in excess of that described above.

12/19/2024

X

CHAIRPERSON

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 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Army Regulation (AR) 600-8-19 (Enlisted Promotions and Reductions) prescribes policies and procedures governing promotions and reductions of Army enlisted personnel.

a. Paragraph 1-10 (Non Promotable Status) provides that Soldiers are non promotable to a higher rank when they are denied favorable personnel actions under the provisions of AR 600-8-2 (Suspension of Favorable Personnel Actions (Flag)).

b. Because HRC and regional support commands (RSCs) administer promotions to ranks SFC through sergeant major (SGM), colonel (COL)-level CDRs are responsible for notifying HRC when Soldiers in those ranks whose names appear on a recommended list become non promotable. When a Soldier has been flagged under the provisions of AR 600-8-2, COL-level CDRs must forward documentation, to include the initial DA Form 268, explaining the reason for the flagging action. When the flagging action is closed, COL-level CDRs must forward a copy of the final DA Form 268, the date the Flag is closed, type of punishment received, date all punishment is completed (including all periods of suspension), and/or date that a memorandum of reprimand was approved for filing. This information (including locally filed memorandum/letters) will be used to determine the Soldier's eligibility to remain on a centralized selection list by means of the procedures in chapter 4. For all other cases, the HR specialist will provide the Soldier's name and a brief summary of circumstances that caused the Soldier to become non promotable. All correspondence will be mailed to AHRC, and will include the Soldier's sequence number, promotion MOS, and the date the Soldier became non promotable.

c. Paragraph 1-11 (Delay of Promotion Due to Suspension of Favorable Personnel Actions for Soldiers on a Centralized Promotion List) provides that when a delay of promotion occurs because of an imposed Flag, the following rules apply once the final DA Form 268 has been prepared. The Soldier's promotion status will be determined as follows:

- if the Flag is lifted with the disposition, case is closed favorably, and he or she would have been promoted while the Flag was in effect, provided otherwise qualified in accordance with paragraph 1-10 and other applicable provisions,

- he or she will be promoted; Effective date and Date of Rank (DOR) will be the date the Soldier would otherwise have been promoted
- if the Soldier's final report is closed with "Disciplinary action taken," and he or she would have been promoted while the Flag was in effect, provided otherwise qualified, he or she will be promoted unless action has been initiated to remove the Soldier from the recommended list; Effective date and DOR will be the date following the removal of the suspension of personnel actions
- effective date and DOR stated on a promotion instrument will be the same; The effective date reflected on the promotion instrument will be the effective date used on the grade change (GRCH) transaction unless otherwise specified in this regulation

d. Paragraph 5-20 (Reinstatement to Promotion Selection List) provides that a Soldier removed from a promotion selection list and later considered exonerated will be reinstated on the promotion selection list. To be considered exonerated, the action that caused the initial removal must have been erroneous or should not have been imposed. If the Soldier would have been promoted had he or she not been removed from the promotion selection list, he or she will be promoted when the next vacancy occurs for the Soldier's MOS and grade.

e. Section IV (Processing Requests for Standby Advisory Board Consideration) provides that the Deputy Chief of Staff, G-1 or designee may approve cases for referral to a STAB upon determining that a material error existed in a Soldier's AMHRR when the file was reviewed by a selection board. STABs are convened to consider records of Soldiers whose records were not properly constituted, due to material error, when reviewed by the regular board or recommended Soldiers on whom derogatory information has developed that may warrant removal from a recommended list. Reconsideration will normally be granted when an adverse NCOER or Academic Evaluation Report reviewed by a board was subsequently declared invalid in whole or in part and was determined by the Army Review Boards Agency to constitute a material error.

3. AR 600-37 (Unfavorable Information) provides policies regarding unfavorable information considered for inclusion in official personnel files. Paragraph 7-2 (Policies and Standards) provides that once an official document has been properly filed in the Official Military Personnel File (OMPF), it is presumed to be administratively correct and to have been filed pursuant to an objective decision by competent authority. Thereafter, the burden of proof rests with the individual concerned to provide evidence of a clear and convincing nature that the document is untrue or unjust, in whole or in part, thereby warranting its alteration or removal from the OMPF. Normally, consideration of appeals is restricted to grades E-6 and above, to officers, and to warrant officers. Although any Soldier may appeal the inclusion of a document placed in his or her file under this

regulation, the appeals of Soldiers in grades below E–6 will only be considered as an exception to policy. This does not include documents that have their own regulatory appeal authority such as evaluation reports and court-martial orders. Appeals that merely allege an injustice or error without supporting evidence are not acceptable and will not be considered.

a. Paragraph 2-3 provides that the Department of the Army Suitability Evaluation Board (DASEB) makes determinations upon appeal of unfavorable information filed in a Soldier’s Army Military Human Resources Record (AMHRR). The DASEB may determine to revise, alter, or remove such unfavorable information if it is determined to be untrue or unjust, in whole or in part. The DASEB makes determinations, upon appeal, on requests to transfer unfavorable information from the performance to the restricted portion of the AMHRR. The DASEB may recommend the transfer of those administrative memoranda of reprimand when such transfer would be in the best interest of the Army.

b. The DASEB is the initial appeal authority and makes recommendations for removal, alteration, or transfer of unfavorable information entered in the AMHRR. This chapter sets forth the policies and procedures whereby a person may seek removal of unfavorable information from his or her AMHRR, or transfer of unfavorable information from the performance file to the restricted file of his or her AMHRR.

4. AR 600-8-104 (Army Military Human Resource Records Management) prescribes policies governing the AMHRR Management Program. The AMHRR includes, but is not limited to: the OMPF, finance-related documents, and non-service related documents deemed necessary to store by the Army. Paragraph 3-6 provides that once a document is properly filed in the AMHRR, the document will not be removed from the record unless directed by the Army Board for Correction of Military Records or another authorized agency. Appendix B (Documents Required for Filing in the AMHRR and/or iPERMS)) provides that the Chief, Army Personnel Records Division is designated as the Army’s personnel record custodian with authority pertaining to all Active Component and USAR Soldiers, retired Soldiers, and Army veterans whose records are stored in iPERMS and at the National Personnel Records Centers (NPRC). This authority may not be further delegated.

5. 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 applicant’s 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//