

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 July 2024

DOCKET NUMBER: AR20240007399

APPLICANT REQUESTS: correction of his record to show he was considered under a Special Selection Board (SSB) for promotion to the rank/grade of brigadier general (BG)/O-7 for the Fiscal Year (FY) 2023 and FY 2024 Army Competitive Category (ACC) Promotion Selection Board (PSB).

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

FACTS:

1. The applicant states:

a. Correcting his military personnel records to reflect his removal from the promotion list for the FY 2022 (FY22) ACC BG PSB by the Secretary of the Army, effective 6 November 2022, or earlier to allow consideration by a SSB for FY23 and FY24. This change in his service records would correct inequities and injustices that resulted from the Army's failure to request a timely extension of his Promotion Eligibility Period (PEP) for the FY22 PSB. He requests expedited processing to allow any SSB for FY23 and FY24 to convene prior to the next ACC BG PSB for FY25 which is scheduled to convene on 4 November 2024.

b. He was recommended for promotion by the FY22 ACC BG PSB, but not confirmed by the Senate prior to expiration of his original 18-month PEP (Promotion Eligibility Period). During those 18 months, his nomination was affected first by the hold on all general officer nominations until December 2023, then by an individual Senate hold despite ongoing full support by the Army and Department of Defense (DoD). His original PEP expired on 1 May 2024, but, due to internal Army administrative error, a 12-month PEP extension was not timely requested from Office of the Secretary of Defense, and he was removed from the promotion list by operation of law on that date. Retroactive approval of such a request is prohibited by law and the DoD has declined to act on untimely requests. Because he was on the FY22 list, he was not eligible for consideration by either the FY23 or FY24 PSBs. Correcting the removal date from the FY22 list to an earlier date would allow him the opportunity to re-compete for

recommendation for promotion based on the boards closest in time to his original recommendation.

2. A review of the applicant's official record shows the following:

a. On 17 May 1997, the applicant was appointed as a Reserve commissioned officer and executed an oath of office with a subsequent call to active duty. His service record contains multiple DA Forms 1059 (Service School Academic Evaluation Reports) reflective of completion of

- Infantry Officer Basic Course, 25 August 1997 to 19 December 1997
- Infantry Captains Career Course, 15 March 2001 to 25 July 2001
- College of Naval Command and Staff, 20 August 2012 to 21 June 2013

b. On 21 June 2013, the U.S. Army Human Resources Command (AHRC) published Orders Number 172-011 promoting the applicant to lieutenant colonel/O-5, effective on and with a Date of Rank (DOR) of 1 July 2013.

c. DA Form 1059-2 (Senior Service and Command and General Staff College Academic Evaluation Report), 8 June 2018, shows the applicant completed the U.S. Army War College from 7 August 2017 through 8 June 2018.

d. On 18 September 2018, AHRC published Orders Number 261-004 promoting the applicant to colonel/O-6, effective on and with a DOR of 1 October 2018.

e. On 19 April 2024, Department of the Army published Orders Number 0007886665.00 ordering the applicant on a permanent change of station to Fort Liberty, NC, effective 15 July 2024.

3. On 11 July 2024, the Office of the Chief of Staff, provided an advisory opinion which stated:

a. The applicant was selected by the FY22 ACC BG PSB for promotion to BG. The Secretary of the Army (SA) convened the board by memorandum pursuant to Title 10, United States Code (USC), section 611. The board convened on 20 November 2021 and the board results were routed for legal review and approval on 15 June 2022. The Office of The Judge Advocate General (OTJAG) reviewed the results in DAJA-AL 2022/2717, 23 June 2022 without legal objection.

b. The Chief of Staff, Army (CSA) recommended approval of the FY22 ACC BG PSB results on 23 September 2022 and SA recommended approval on 29 September 2022. The FY23 and FY24 ACC BG PSBs convened on 7 November 2022 and 14 November 2023, respectively. Based on his status on the FY22 ACC BG PSB

recommended list, the applicant was ineligible for consideration by the FY23 and FY24 ACC BG PSBs at the time those boards convened. The Secretary of Defense (SecDef) approved the FY22 ACC BG PSB results, pursuant to delegated authority for the President, on 28 November 2022. The SecDef approval date established his initial PEP expiration date as 1 May 2024 pursuant to Title 10, USC, section 629. The FY22 list was not transmitted to the President until 18 January 2023 and was not received in the Senate until 16 February 2023.

c. As a result of an administrative error, the Army did not initiate a PEP extension until after 1 May 2024. A miscalculation using the 18 January 2023 transmission date rather than the 28 November 2022 approval date, resulted in belief that the applicant's PEP did not expire until 1 July. Neither the delay in transmission nor the mistaken calculation of his PEP resulted from any action by the applicant or within his span of control or influence. The Army still processed a request for retroactive PEP extension. In DAJA-AL 2024/2156, 17 May 2024, OTJAG reviewed the request and advised there was no statutory authority for retroactive approval, but equitable relief may be appropriate.

d. On 1 July 2024, the Deputy Assistant Secretary of Defense (Military Personnel Policy (DASD-MPP)) returned the PEP extension request without action. Specifically, the memorandum explained that pursuant to "Title 10, USC, section 629( c), he had a promotion eligibility period of 18 months beginning on 28 November 2022 and ending on the first day of the 18th month following the month in which the board report was approved, which was 1 May 2024." The memorandum also notes that "section 629( c) requires that the extension be made before the period expires."

e. By operation of law, the applicant was removed from the FY22 ACC BG PSB promotion list when his PEP expired on 1 May 2024. The Army deferred action to give effect to his removal until 1 July 2024 when the DASD-MPP notified the Army there was no basis on which to retroactively approve a PEP extension.

f. Pursuant to Title 10, USC, section 628, there is no statutory authority to execute an SSB for the applicant based on the FY23 or FY24 ACC BG PSB unless his date of removal from the FY22 ACC BG PSB is backdated to before the convene date of those boards. Under provisions of Title 10, USC, section 628, an officer may be entitled to an SSB when they were not considered by a PSB when they should have been as a result of an administrative error or when SA determines they were considered by the PSB but in an unfair manner. Unless the applicant's effective date of removal is changed, there is no authority to provide him with an SSB because Title 10, USC, section 619 prohibited the FY 23 ACC BG PSB from considering the applicant since he was recommended for promotion by the FY22 ACC BG PSB. Likewise, Title 10, USC, section 619 also prohibited the FY24 ACC BG PSB from considering the applicant, because at the time

that board convened, he remained on a promotion list approved by the President. Additionally, there is no basis for him to allege unfairness in either FY23 or FY24 since neither board considered him.

g. Pursuant to Title 10, USC, section 629(e), once an officer is removed from the promotion list, they then become eligible for promotion consideration. Accordingly, the applicant is eligible for consideration by the FY25 ACC BG PSB and, if selected and promoted by the FY25 PSB, SA may grant him a DOR pursuant to Title 10, USC, section 629(e) on "the same date he would have had if his name had not been so removed" from the FY22 promotion list. However, such consideration would not fully remedy all injustices that resulted from the failure to request a timely PEP extension.

h. Service Secretaries may correct a Soldier's military record when necessary to correct an error or remove an injustice in accordance with Title 10, USC, section 1552(a). However, except in limited circumstances dealing with accessions, corrections must be made by the Secretary acting through a board of civilians. The promotion opportunity at each PSB is unique based on several factors including the needs of the Army, the number of officers in the promotion zone, and estimates of future Army needs. Additionally, an individual officer's competitiveness for promotion changes over the course of their career.

i. In this case, limiting the applicant to competition for promotion at a board three years after he was originally selected is unfair as he will be competing significantly later in his career timeline than other members in the considered population and is likely to have additional documents in his board file that factor in his status on a promotion list. Moreover, his early removal is solely the result of an administrative error by the Army in not requesting a routine PEP extension for up to 12 months. Had a PEP extension been requested prior to 1 May 2024, the DASD(MPP) memo indicates approval is "routinely" granted. Accordingly, but for the Army's administrative error, the applicant would be on a promotion list until 1 May 2025 and, if confirmed, would be promoted to BG.

j. Pursuant to Title 10, USC, section 629(e), if an officer is removed from a promotion list due to the expiration of their promotion eligibility period, and is recommended for promotion by the next selection board convened for his grade and competitive category and promoted to that grade, the Secretary of the Army may grant him the same DOR, the same effective date for pay and allowances of the new grade, and the same position on the active-duty list as he would have had if his name had not been removed. In this case, use of this authority would require consideration, selection, and promotion based on the FY25 ACC BG PSB, the next selection board convened for the ACC and promotion to BG. This would result in the same effective DOR that he would have had if he were promoted based on his place on the FY22 ACC BG PSB promotion list.

k. Alternatively, if removed by the Army Review Boards Agency action with an earlier effective date, he would have the effective DOR "he would have had if he had been recommended for promotion to that grade by the board which should have considered" him but did not-either the FY23 or FY24 ACC BG PSB.

4. The applicant had an opportunity to see/examine the advisory opinion and he concurred.

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The applicant requests retroactive removal from the Brigadier General (BG) promotion list for the Fiscal Year 2022 (FY22) Army Competitive Category (ACC) BG Promotion Selection Board (PSB) and a Special Selection Board (SSB) for the FY23 and FY24 ACC BG PSBs. The Board noted that the applicant was selected by the FY22 ACC BG PSB for promotion to BG. The Secretary of Defense (SecDef) approved the FY22 ACC BG PSB results on 28 November 2022, which established the applicant's promotion eligibility period (PEP) initial PEP expiration date as 1 May 2024v (18 months). The Army incorrectly believed that the applicant's PEB was 1 July 2024 rather than 1 May 2024. Based on this incorrect belief, the Army requested a PEB extension after 1 May 2024, which is not legally authorized. By operation of law, the applicant was removed from the FY22 ACC BG PSB promotion list when his PEP expired on 1 May 2024. The Army deferred action to give effect to his removal until 1 July 2024 when the DASD(MPP) notified the Army there was no basis on which to retroactively approve a PEP extension. This administrative error resulted in an injustice to the applicant. Furthermore, the Board thoroughly reviewed and agreed with the advisory opinion to change the effective date of applicant's removal from the FY22 ACC BG PSB promotion list. Upon that change, the Board also agreed that the applicant would then become eligible for a SSB for the FY23 and FY24 ACC BG PSB because he was not considered by those boards when they convened and would have been eligible, but for his status on the FY22 ACC BG PSB promotion list. If selected and confirmed for promotion, the Secretary of the Army (SA) may grant him an appropriate date of rank pursuant to the SSB that selects him.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

■	■	■	GRANT FULL RELIEF
:	:	:	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:

a. Showing the applicant was removed from the Fiscal Year 2022 (FY22) Army Competitive Category (ACC) Brigadier General (BG) Promotion Selection Board (PSB) on or before 6 November 2022

b. Submitting the applicant's records to a duly constituted Special Selection Board (SSB) for promotion consideration to BG the FY23 and FY24 ACC BG PSBs.

(1) If he is selected for promotion, correcting his records to show he met all the eligibility criteria for promotion effective the date of release of the applicable promotion selection board, promoting him to BG with the appropriate effective date and date of rank, and paying him any associated back pay and allowances as a result of the corrections; and

(2) If he is not selected by the SSB, he should be so notified.

**X**

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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 629 (Removal from a list of officers recommended for promotion) states If an officer whose name is on a list of officers approved for promotion under section 624(a) of this title to a grade for which appointment is required by section 624(c) of this title to be made by and with the advice and consent of the Senate is not appointed to that grade under such section during the officer's PEP, the officer's name shall be removed from the list unless as of the end of such period the Senate has given its advice and consent to the appointment. Before the end of the PEP with respect to an officer under paragraph (1), the President may extend that period for purposes of paragraph (1) by an additional 12 months. In this subsection, the term "PEP" means, with respect to an officer whose name is on a list of officers approved for promotion under section 624(a) of this title to a grade for which appointment is required by section 624(c) of this title to be made by and with the advice and consent of the Senate, the period beginning on the date on which the list is so approved and ending on the first day of the eighteenth month following the month during which the list is so approved. An officer whose name is removed from a list under subsection (a), (b), or (c) continues to be eligible for consideration for promotion. If he is recommended for promotion by the next selection board convened for his grade and competitive category and he is promoted, the Secretary of the military department concerned may, upon such promotion, grant him the same DOR, the same effective date for the pay and allowances of the grade to which promoted, and the same position on the active-duty list as he would have had if his name had not been so removed.

2. Army Regulation 600-8-29 (Officer Promotions) states:

a. Paragraph 6-2 (Purpose of boards) SSBs may be convened under Title 10, USC, section 628 to consider or reconsider commissioned or warrant officers for promotion when Headquarters Department of the Army (HQDA) determines that one or more of the following circumstances exist:

(1) 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. This would include officers who missed a regularly scheduled board while on the Temporary Disability Retired List and who have since been placed on the Active Duty List.

(2) Material unfairness (Title 10, USC, 628(b)(1)) (HRC discretionary). (a) The action of the promotion board that considered the officer from in or above the promotion zone was contrary to law in a matter material to the division of the board or involved material error of fact or material administrative error. (b) The board that considered the officer from in or above the promotion zone did not have before it for its consideration material information.

b. Paragraph 6-3 (Cases not considered) an officer will not be considered or reconsidered for promotion by an SSB when an administrative error was immaterial, or the officer, in exercising reasonable diligence, could have discovered and corrected the error in the Army Human Resources Record (AMHRR). It is the officer's responsibility to review his or her AMHRR before the board convenes and to notify the board, in writing, of possible administrative deficiencies.

c. Paragraph 6-7 (Information provided to SSBs) an SSB will consider the record of the officer as it should have been considered by the original board. The record will be compared with a sampling of those officers of the same competitive category, who were recommended and not recommended for promotion by the original selection board.

d. Paragraph 6-10 (Effect of selection for promotion) Officers selected for promotion by an SSB will, as soon as practicable, be appointed to that grade in accordance with Title 10, USC, section 624 b. An officer appointed to the next higher grade as the result of the recommendation of an SSB will have the same date of grade, the same effective date for the pay and allowances of that grade, and the same position on the Active Duty List (ADL) as the officer would have had if he or she had been recommended for promotion to that grade by the board which should have considered, or which did initially consider, him or her. In the case of an officer who is not on the ADL when appointed to the next higher grade, placement on the ADL pursuant to the preceding sentence will be only for purposes of determination of eligibility of that person for consideration for promotion by any subsequent SSB.

//NOTHING FOLLOWS//