

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 February 2025

DOCKET NUMBER: AR20240008139

APPLICANT REQUESTS:

- restoration of rank to sergeant first class (SFC)/E-7
- retirement with an effective date no earlier than 25 June 2023
- backpay of entitlements

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

- DD Form 149 (Application for Correction of Military Record)
- Legal Brief in Support of Restoration of Rank and Retirement, 27 March 2024
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 25 June 2023
- Memorandum – Subject: Request for Voluntary Retirement and an Additional 10 Days of Permissive Temporary Duty, 9 May 2022
- Email communication
- Memorandum – Subject: Request for Voluntary Retirement and an Additional 10 Days of Permissive Temporary Duty, 1 May 2022
- Orders Number 5270579, 6 July 2023
- Email communication
- Memorandum – Subject: Involuntary Separation Pursuant to Army Regulation 135-178, Chapter 11-1c (Commission of a Serious Offense), 25 June 2023
- Orders Number 5194686.01, 29 June 2023
- Email communication
- Memorandum – Subject: Notification of Consideration for Calendar Year 2022 (CY22) Active Guard Reserve (AGR) Active Service Management Board (ASMB), 12 January 2022
- Email communication
- Memorandum – Subject: Non-Retention for Continued Service on the CY22 Utah Army National Guard (ARNG) Enlisted Active Guard Reserve (AGR) Active Service Management Board (ASMB), 13 July 2022
- Email communication
- Memorandum – Subject: Notification of Separation Proceedings Under Army Regulation 135-178, Chapter 11, 5 July 2022

- Memorandum – Subject: Notification of Separation Proceedings Under Army Regulation 135-178, Paragraph 3-5 and NGR 600-200, Paragraph 6-32, 5 July 2022
- Email communication
- Memorandum – Subject: Recommendation to Separation Authority, 11 January 2023
- Memorandum – Subject: Request for Voluntary Retirement, 22 February 2023
- DA Form 3822 (Report of Mental Status Evaluation), 25 January 2023
- NGB Form 23B (Army National Guard Retirement Points History Statement), 17 January 2023
- Email communication
- Memorandum – Subject: Request for Voluntary Retirement and an Additional 10 Days of Permissive Temporary Duty, 1 May 2022
- Memorandum - Subject: Calendar Year 2022 (CY22) Active Guard Reserve (AGR) Active Service Management Board (ASMB) Election Requirement, 22 February 2023
- Email communication
- Memorandum – Subject: Request for Exception to Policy for CY22 ASMB Release for UTARNG Soldier, 7 February 2023
- Memorandum – Subject: Exception to Policy Request, 2 March 2023

FACTS:

1. The applicant states that the Assistant Secretary of the Army (ASA) (Manpower and Reserve Affairs) (M&RA) directed that he be separated with an Other Than Honorable characterization of service on 25 June 2023. This action required that he be reduced to the lowest enlisted rank. The applicant contests that the decision was made without regard to his previously submitted request for retirement (9 May 2022). He notes that this was done 7 months prior to the UTARNG conduct of a separation board (15 December 2022), 2 months before the UTARNG provided notification of their intent to administratively separate him (5 July 2022) and prior to the completion of the Calendar Year 2022 AGR ASMB (13 July 2022). The applicant argues that these actions demonstrate how his request for voluntary retirement was “slow rolled” and later denied citing that its submission was untimely. In a letter provided by the legal counsel of the applicant, he notes that the applicant was assisted by several individuals to include a Senior Enlisted Leader (SEL) who recommended to members of leadership to not concur/place on hold the applicant’s submitted request for retirement. Instead, they should allow the ASMB to be convened. The SEL also provided additional erroneous information wherein he cited that the Adjutant General (TAG) was the final approving authority and therefore they should suspend all actions until the investigation was completed. This guidance resulted in the stagnation of the applicant’s request.

On 25 May 2022, the ASMB was convened resulting in the applicant being selected for separation. Counsel contends that had proper coordination been made, this action would have prompted action on his request for retirement in concert with his release from the AGR program. At the direction of legal counsel, on 3 June 2022, the applicant submitted an additional request for retirement. However, on 5 July 2022, he was informed of the UTARNGs intent to process him for involuntary separation. Counsel again notes that action should have been taken to comply with the applicant's request for retirement.

On 13 July 2022, the applicant was notified that he was not being retained and therefore would be released from the AGR program. Included in this notification was the applicant being afforded the option to apply for retirement. Citing the confusion that this caused, the applicant believed that he had no other option but to continue with the involuntary separation process and that his submitted request for voluntary separation would still be processed. On 15 December 2022, an ASB was conducted recommending that the applicant be separated with an Other Than Honorable characterization of service.

On 2 February 2023, an email circulated from HQDA G-1 to the National Guard Bureau (NGB) inquiring about the applicant's separation seeking clarity regarding whether he chose to not submit a request for retirement. Counsel argues that this clearly reflects that HQDA had not seen his previously submitted request. Instead of researching the matter, the Staff Judge Advocate responded noting that the applicant had not submitted a request for retirement because of an existing service obligation associated with his election to transfer education benefits under the Post 9/11 G.I. Bill. Counsel contests the validity of this statement as there is no evidence of this nor documentation that this correspondence ever occurred. Counsel argues that the applicant made his election in 2018.

On 22 February 2023, HQDA advised that 2 documents (Memorandum for Record) were required: 1 reflective of the applicant not applying for retirement and the other stating that the applicant had not submitted an election following his selection for non-retention by the ASMB. Further email communication from the SEL indicates that he was not tracking a retirement letter from the applicant; nothing signed by the TAG. Counsel notes that this is the same SEL that advised persons back in May 2022 of an artificial rule indicating that the TAG must sign the request for retirement before it is acknowledged. This artificial rule created a barrier preventing any action on the applicant's multiple requests for retirement.

On 12 July 2023, the UTARNG, in response to an email from the applicant, UTARNG appeared to realize that they failed to process his voluntary request for retirement. In that string of emails, the UTARNG acknowledged that this would need to be addressed by the ABCMR, but it incorrectly and improperly suggested that the

success of this appeal would be low because his appeal would "revoke the ASA M&RAs decision to separate. Counsel argues that this misunderstanding is significant as it underscores the malicious intent behind the earlier actions of others in the UTARNG that constituted violations of procedural due process.

On 7 February 2023, the UTARNG TAG requested an exception to policy. Of note is that this request nor the approval by the Chief, National Guard Bureau mentioned that the applicant had submitted a request to retire. Counsel argues that the ASMB had been utilized to delay and deny the applicant's request for retirement and was now the subject of an ETP to extend the applicant.

On 26 June 2023, UTARNG received the ASA M&RAs decision to involuntarily separate the applicant with an Other than Honorable characterization of service. Counsel argues that this was done, despite their repeated request for information and or knowledge of the applicant's submitted request for retirement or the wrongful withholding of it. Counsel argues that in accordance with Army Regulation 635-200, paragraph 2-12, a Soldier who has completed 20 or more years of active service creditable toward retirement and for whom separation is recommended to HQDA will be given the opportunity of applying for retirement.

In conclusion Counsel argues that as a matter of equity, the applicant was wrongfully denied the right to request retirement by the UTARNG. After over 21 years of active federal service, he deserved the proper exercise of law and regulation.

2. A review of the applicant's available service records reflect the following:

a. After serving in the U.S. Marine Corps, on 3 February 2005, the applicant enlisted in the UTARNG.

b. On 28 July 2016, the UTANG issued Orders Number 210-022 ordering the applicant to Full-Time National Guard Duty in the AGR program effective 16 August 2016, for 3 years 5 months 18 days with duty as a Recruiter & Retention Noncommissioned Officer.

c. On 4 December 2016, the UTARNG issued Orders Number 339-013 announcing the applicant's promotion to SFC effective 1 December 2016.

d. On 20 November 2019, the UTARNG issued Orders Number 324-017 extending the applicant in the AGR program for 4 years with a 2 February 2024 expiration date.

e. On 2 March 2022, the applicant was issued a Notification of Eligibility for Retired Pay for Non-Regular Service (20-Years) letter.

f. On 25 June 2023, the applicant was retired from military service at the rank of PVT/E-1 in accordance with Army Regulation 600-5, paragraph 6-5 (Misconduct – Sexual Perversion). DD Form 214 reflects the following:

- Item 12c. (Net Active Service this Period) – 16 years 10 months 10 days
- Item 12d. (Total Prior Active Service) – 4 years 5 months 29 days
- Item 23 (Type of Separation) – Retirement
- Item 24 (Characterization of Service) – Other Than Honorable Conditions
- Item 26 (Separation Code) – JKL
- Item 27 (Reentry Code) - 4

g. On 26 June 2023, the UTARNG issued Orders Number 5183471, announcing the applicant's reduction to PVT/E-1 effective 24 June 2023 due to his Other Than Honorable characterization of service.

h. On 4 October 2023, the UTARNG issued Orders Number 6201802 announcing the applicant's involuntary separation from the ARNG effective 1 October 2023.

3. The applicant provides:

a. Memorandum – Subject: Request for Voluntary Retirement and an Additional 10 Days of Permissive Temporary Duty, 9 May 2022, reflective of the applicant's submitted request for retirement with an effective date of 29 February 2024.

b. Email communication reflective of redacted communication concerning the applicant's submitted request for retirement during the period of May 2022 – July 2023. These documents are further provided in their entirety for the board members review within the supporting documents.

c. Memorandum – Subject: Request for Voluntary Retirement and an Additional 10 Days of Permissive Temporary Duty, 1 May 2022, reflective of the applicant's submitted request for voluntary retirement with an effective date of 3 February 2024.

d. Orders Number 5270579, 6 July 2023, reflective of the applicant's involuntary separation from military service effective 25 June 2023.

e. Email communication, reflective of communication concerning the applicant's discharge from military service. The applicant was advised that due to his Other Than Honorable characterization of service, he was reduced to PVT/E-1 .

f. Memorandum – Subject: Involuntary Separation Pursuant to Army Regulation 135-178, Chapter 11-1c (Commission of a Serious Offense), 25 June 2023, reflective of

ASA M&RA directing that the applicant be released before reaching his expiration term service date with an Other Than Honorable characterization of service.

g. Orders Number 5194686.01, 29 June 2023, reflective of Orders Number 5194686 being revoked.

h. Email communication (May 2022), reflective of the SEL advising that the UTARNG not concur with the applicant's voluntary retirement request. Instead, it should be placed on hold until the ASMB is conducted.

i. Memorandum – Subject: Notification of Consideration for Calendar Year 2022 (CY22) AGR Active Service Management Board (ASMB), 12 January 2022, reflective of the applicant being advised that he was being considered for retention in the AGR program. The applicant was given a 14 April 2022 suspense to update his personnel and medical records.

j. Email communication, reflective of the applicant being advised on 18 January 2022, that he was being considered by the CY22 ASMB for retention in the AGR program. The applicant was advised that if retirement was in his plans, he would need to coordinate his timeline through the Human Resources Office.

k. Memorandum – Subject: Non-Retention for Continued Service on the CY22 UTARNG Enlisted AGR ASMB, 13 July 2022, reflective of the applicant being advised that his records were reviewed the UTARNG TAG concurred with the recommendation that he be released from the AGR program under the provisions of ASMB no later than 31 May 2023. The applicant was afforded 3 options: return to a traditional drilling status, apply for retirement or transfer into the U.S. Army Reserve (USAR). He was given 30 days to respond.

l. Email communication, reflective of the applicant's receipt of the notification of the TAG memorandum referenced in 3k. above.

m. Memorandum – Subject: Notification of Separation Proceedings Under Army Regulation 135-178, Chapter 11, 5 July 2022, reflective of the applicant being advised of the initiation of separation action in accordance with Army Regulation 135-178, chapter 11, section 112-1, paragraph c. due to his commission of a serious offence in that he engaged in sexual intercourse on 3 occasions without the consent of the person involved. The applicant was further advised that his characterization of service would be Other Than Honorable. This separation action was suspended for 45 days to afford the applicant the opportunity to exercise his rights.

n. Memorandum – Subject: Notification of Separation Proceedings Under Army Regulation 135-178, paragraph 3-5 and NGR 600-200, paragraph 6-32, 5 July 2022,

reflective of the applicant's acknowledged receipt of the notification to separate. The applicant elected to waive his right to submit a statement and requested counsel representation.

o. Email communication reflective of communication concerning the applicant's investigation and pending separation occurring between January - February 2023. This communication is further provided in its entirety within the supporting documents for the board member's review.

p. Memorandum – Subject: Recommendation to Separation Authority, 11 January 2023, reflective of the TAGs recommendation for approval of the ASMB determination that the applicant should be separated from the UTARNG due to misconduct noting that his sexual assault and the abuse of his position (Recruiter) are incongruous with military service. His separation is in the best interest of the Army as there is not room for sexual predators within the ranks of the military.

q. Memorandum – Subject: Request for Voluntary Retirement, 22 February 2023, reflective of the UTARNG, AGR Managers account that there is no record of the applicant having an approved request for voluntary retirement on file with the UTARNG.

r. DA Form 3822 (Report of Mental Status Evaluation), 25 January 2023, reflective of the results of the mental status evaluation conducted on the applicant's behalf in association with his pending separation from military service for misconduct.

s. NGB Form 23B (Army National Guard Retirement Points History Statement), 17 January 2023, reflective of the applicant's qualifying service completed between 20 March 1995 – 17 January 2023 (20 years 11 days).

t. Email communication, reflective of communication concerning the applicant's request to correct his pending discharge. On 13 July 2023, the Retirement Services personnel advising that the applicant had a 14 April 2022 suspense to sign/submit his retirement request. He did not sign the letter requesting retirement until 9 May 2022. The applicant was further advised that this matter would need to be addressed with the ABCMR. This communication is further provided in its entirety within the supporting documents for the board member's review.

u. Memorandum – Subject: Request for Voluntary Retirement and an Additional 10 Days of Permissive Temporary Duty, 1 May 2022, reflective of the applicant's submitted request for voluntary retirement with an effective date of 3 February 2024.

v. Memorandum - Subject: Calendar Year 2022 (CY22) AGR ASMB Election Requirement, 22 February 2023, reflective that as of 22 February 2023, the applicant

had not responded with his election to return to a drilling status, voluntary retire (within 30 days) or transfer to the USAR as required by the CY22 ASMB notification.

w. Email communication, reflective of communication concerning the applicant's approved administrative discharge more specifically the submission of an ETP to allow for the administrative action to take precedence up until the applicant's ETS date (February 2024) thereby affording additional time to pursue the administrative separation with an Other than Honorable characterization of service.

x. Memorandum – Subject: Request for Exception to Policy for CY22 ASMB Release for UTARNG Soldier, 7 February 2023, reflective of the TAGs submitted request for an ETP in order to additional time to pursue the administrative separation with an Other than Honorable characterization of service. This request was submitted due to the results of an investigation that was revealed after the UTARNG CY22 ASMB was conducted, and the applicant was notified of his pending release from active duty due to the board results.

y. Memorandum – Subject: Exception to Policy Request, 2 March 2023, reflective of the NGBs approval of the ETP request permitting the applicant to remain on active duty from 31 May 2023 – 1 February 2024, while pursuing an administrative separation with Other Than Honorable characterization of service.

4. On 10 February 2025, the National Guard Bureau, Chief, Special Actions provided an advisory opinion recommending denial of the applicant's request noting that the applicant's retirement letter is dated 9 May 2022, requesting separation effective 29 February 2024, approximately 21 months after submitting the retirement letter. This same retirement letter was submitted on 3 June 2022. On 12 July 2023, after the separation had been approved by the ASA M&RA was the next time the applicant raised the issue with his chain of command. When the applicant submitted the retirement request in May and June 2022, Army Regulations permitted submission of a retirement request 12-months in advance of the proposed retirement date. His retirement request was 21 months in advance of the date he proposed for his effective retirement. Therefore, the retirement request was invalid based on the regulations at the time, the effective date was not within the 12-month window. The applicant could have requested retirement in lieu of separation or in response to the ASMB notification. Both of those notifications were provided to him in July 2022. He never made an election to the results of the ASMB nor requested retirement in lieu of separation proceedings.

On 16 December 2022, one day after his administrative separation board was completed, Headquarters Department of the Army (HQDA) published a Military Personnel Message (MILPER) that allows a Soldier to submit a retirement request 24 months in advance of his proposed retirement date. The applicant did not submit a

retirement request or follow-up on his previously invalid retirement request after this date until after his separation had been finalized.

Additionally, the applicant had a military service obligation that required him to serve until 23 April 2023. Contrary to Legal Counsel's argument (paragraph 14), a review of the applicant's Education Benefits reflect that he transferred his Post 9/11 GI Bill benefits to his dependents on 24 April 2019, and as a result incurred a service obligation until 23 April 2023. Further, Legal Counsel incorrectly provides the purpose of the ETP request. The ETP request was for the applicant to be permitted to stay in an AGR status. ASMB and ETP have no bearing on his separation from service or the U.S. Army Reserve. If the applicant would have been released from the AGR Program, he would have reverted to an M-Day status and continued to drill as a USAR Soldier until his retirement was approved or his separation was approved by the ASA (M&RA).

5. On 10 February 2025, the applicant was provided with a copy of the advisory opinion and afforded 15 days to provide comments. As of 25 February 2025, the applicant has not responded.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive review based on law, policy, and regulation. Upon review of the applicant's petition and available military records, the Board reviewed and concurred with the National Guard Bureau's advising official finding the applicant submitted his retirement request prior to being eligible and then was administratively separated and did not further request retirement in his eligibility window. The Board found no error or injustice and denied relief pertaining to the applicant's request for retirement with an effective date no earlier than 25 June 2023, with backpay and entitlements.

2. The Board considered the applicant's request for restoration of his rank to SFC/E-7. However, found insufficient evidence to support the applicant's request. The evidence of record shows the applicant was reduced in rank from SFC/E-7 by Orders 5183471 on 24 June 2023. The Board found no error or injustice and denied relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

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



X //SIGNED//

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. Army Regulation (AR) 135-178 (Enlisted Administrative Separations), 7 November 2022, implements DoDI 1332.14. It establishes policies, standards, and procedures governing the administrative separation of certain enlisted Soldiers of the Army National Guard/Army National Guard of the United States and the U.S. Army Reserve.

a. Chapter 11 (Misconduct) provides that A Soldier may be discharged for misconduct when it is determined under the guidance set forth in chapter 2, section I, that the Soldier is unqualified for further military service by reason of Commission of a serious military or civilian offense, if the specific circumstances of the offense warrant discharge and a punitive discharge would be authorized for the same or a closely related offense under the UCMJ.

b. Any Soldier convicted of rape, sexual assault, forcible sodomy, or an attempt to commit one of those offenses who is not punitively discharged must be processed for administrative separation for commission of a serious offense. In all instances where administrative separation for an enlisted military sex offender is forwarded to the initial separation authority for final action, and the initial separation authority supports retention, the separation authority will forward the case to the SECARMY for final decision pursuant to Secretarial plenary authority.

c. Favorable personnel action will be suspended in accordance with AR 600-8-2 upon initiation of separation processing under this chapter. Characterization of service normally will be under other than honorable conditions, but characterization as General (Under Honorable conditions) may be warranted under the guidelines in chapter 2, section III. For Soldiers who have completed entry level status, characterization of service as honorable is not authorized, unless the Soldier's record is otherwise so meritorious that any other characterization clearly would be inappropriate. In such cases, separations for misconduct with an honorable characterization will be approved by the separation authority.

2. Army Regulation 600-8-2 (Suspension of Favorable Personnel Actions) prescribes policies, operating rules, and steps governing the suspension of favorable personnel actions, referred to as "Flag" throughout the regulation.

a. Chapter 2 (Policy and Management of Flag) provides that the suspension of favorable actions on a Soldier is mandatory when military or civilian authorities initiate any investigation or inquiry that may potentially result in disciplinary or adverse administrative action.

b. Chapter 3 (Prohibitions and Retention of Flagged Personnel) provides that a properly imposed flag prohibits voluntary retirement. However, enlisted Soldiers who are flagged may submit retirement applications on a case-by-case basis.

3. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), 28 June 2021, sets forth the basic authority for the separation of enlisted personnel. Chapter 12 (Retirement for Length of Service) provides that retirement normally will be in the regular or reserve grade the Soldier holds on to the date of retirement. As an exception, ARNGUS and USAR Soldiers serving on active duty at the time of retirement, in a grade lower than their highest active-duty enlisted grade, who were administratively reduced in grade not because of their own misconduct, will retire at the highest enlisted grade in which they served satisfactorily on active duty. A Soldier who has completed 20 but less than 30 years of active federal service in the U.S. Armed Forces may be retired at his or her request.

a. Paragraph 12-7 (Eligibility) provides that Soldiers who have completed 20 but less than 30 years of active federal service and who have completed all required service obligations are eligible, but not entitled, to retire upon request. Except as indicated in chapter 16 of this regulation, unless restricted in this section, Soldiers who have completed 19 or more years of active federal service may apply for retirement. The request must be made within 12 months of the requested retirement date except as indicated in chapter 16. Soldiers who are under suspension of favorable personnel action under AR 600-8-2 are not precluded from submitting DA Form 2339. Requests for retirement will be considered on a case-by-case basis by the local retirement approval authority.

b. Chapter 14-3 (Characterization of Service or Description of Separations) provides a discharge Under Other Than Honorable conditions is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if such is merited by the Soldier's overall record. When a Soldier has completed entry-level status, or paragraph 11-3c applies, characterization of service as honorable is not authorized unless the Soldier's record is otherwise so meritorious that any other characterization clearly would be inappropriate. Upon determination that a Soldier is to be separated with a discharge under other than honorable conditions, the separation authority will direct reduction to the lowest enlisted grade by the reduction authority. Unless prohibited by law or regulation, the separation authority is authorized to suspend execution of an approved administrative discharge under this chapter.

c. Chapter 16 (Selected Changes in Service Obligations) provides that Soldiers denied or ineligible for continued active-duty service may be separated, upon request. Separation under this paragraph will occur no later than 90 days after the Soldier receives pre-separation counseling as required by law, which must be scheduled as

soon as separation is approved. Any existing service obligation that cannot be fulfilled by the separation date will be waived. Commanders in paragraph 1-20 are authorized to approve or deny requests for separation under this paragraph.

4. Title 10, USC, section 1552 states, 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.

5. Army Regulation (AR) 15-185 (ABCMR) paragraph 2-9 states the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//