It Ain’t Over Till It’s Over:  
The Army Grade Determination Review Board  

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Don’t count your chickens before they are hatched.1

I. Introduction

Retirement and its prospects of a guaranteed pension are critically important to every career Soldier. The current military retirement system of twenty years’ active duty service vesting in a guaranteed pension of half a Soldier’s base pay is a vital tool for retaining quality mid-career Soldiers and ensuring a youthful force.2 The Army grade determination board (AGDRB) plays an important role in ensuring a fair retirement system by serving a dual function.3 The AGDRB has the ability to advance enlisted Soldiers’ rank or reduce officers’ rank at the time of retirement. Thus, the AGDRB can counterbalance the numerous ways an enlisted Soldier can be demoted while also providing the Army a way to address either misconduct or poor performance by officers.4

The AGDRB determines the highest grade at which a Soldier has served satisfactorily before retiring. For officers, the AGDRB can reduce the rank at retirement for criminal or administrative misconduct. In criminal matters, even when clients avoid a jail sentence, criminal convictions act like a General Officer Memorandum of Reprimand (GOMOR) or a referred Officer Evaluation Report (OER) in that they constitute derogatory information in your personnel file.5 Any serious misstep in an officer’s twenty-year career, including a GOMOR or even a court-martial that ends in a conviction but not a punitive discharge, could mean retirement at a rank lower than their current rank. That is because once an officer requests retirement, that adverse information requires Human Resources Command (HRC) to refer the officer’s file to the AGDRB to determine the highest rank at which he or she served honorably — and therefore the proper rank at which they may retire.6

The AGDRB also applies to Soldiers facing mandatory retirement after non-selection or those potentially seeking early retirement. These Soldiers will often be senior leaders who have served for many years, and their cases may command high levels of public interest.7

This primer will explain how the AGDRB works as well as its impact on Army separations and retirements. First, the primer will briefly explore the history of military retirement and the AGDRB’s role. Second, it will explain the scope of the AGDRB and its potential impact in a downsizing Army. Third, the primer outlines the process of the AGDRB, using case studies to illustrate the differences between enlisted and officer situations. Finally, this primer provides recommendations for TDS and legal assistance attorneys on how to best represent their clients to maximize their rank at retirement.

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2 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO Report B-275254, at 3 (Nov. 1996). This Government Accountability Office report responds directly to a query by Congressman Douglas Peterson on potential changes to the military retirement system. The report advocates making changes to the military retirement system due to cost but acknowledged it served as a powerful tool for keeping the force young and retaining quality service members for twenty years. On January 1, 2018, the military will begin implementing a new retirement system, called the Blended Retirement System, which reduces the amount of retirement earned at twenty years of service from 2.5% to 2% per year. National Defense Authorization Act of 2016 and 10 U.S.C. §12733. For a comprehensive look at the new Blended Retirement System (BRS), the Department of Defense (DoD) has set up a website to provide Soldiers and Families with information regarding the new proposal scheduled to take effect on January 1, 2017. This website is located at http://militarypay.defense.gov/BlendedRetirement/.

3 U.S. DEP’T OF ARMY, REG. 15-80, ARMY GRADE DETERMINATION REVIEW BOARD AND GRADE DETERMINATIONS (12 July 2002) [hereinafter AR 15-80].

4 Article 15 and Article 58a, Uniform Code of Military Justice (UCMJ). U.S. DEP’T OF ARMY, REG. 600-8-19, ENLISTED PROMOTIONS AND REduCTIONS para. 10-1 (27 Dec. 2011). Officers cannot be reduced in rank either by non-judicial punishment, courts-martial, or through an administrative reduction. Enlisted Soldiers can be reduced by all three with the limited exception for E-7 and above undergoing non-judicial punishment.

5 The Army also could pursue officer elimination as a result of a conviction by court-martial. U.S. DEP’T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 4.2(c)(2) (12 Apr. 2006) [hereinafter AR 600-8-24]. However, the command’s appetite for a Board of Inquiry after a contested court-martial will probably be minimal if the convicted officer indicates he will retire or resign.

6 AR 15-80, supra note 3, para. 2-2.

7 While there are several examples of senior leader misconduct resulting in retirement at lower rank, perhaps the most famous is Lieutenant Colonel (Ret.) Jeffrey Sinclair. See http://www.latimes.com/nation/nationnow/la-na-nn-army-sinclair-demoted-20140620-story.html [hereinafter Sinclair].
II. Background

A. Retirement in the U.S. Army Before 1916

The U.S. Army did not always have either a large standing military or a generous retirement system. American historical practice dating back to the Revolution relied on a small standing Army during peacetime and mobilization of citizen Soldiers for the conduct of war. This reliance on citizen volunteers was due in part to the limited and provisional separation benefits for regular Army Soldiers. Until the advent of the Civil War, the U.S. Army did not have an actual retirement system authorized. Congress authorized small amounts of severance pay for officers separated in the reductions of 1796, 1800, 1802, and 1815. Although not a pension, Congress provided survivor benefits to families of officers who died from combat; this benefit consisted of half-pay for five years during the period between the Revolutionary War and the War of 1812. This benefit was rarely available, however, as there was little combat activity during this time.

One informal measure during the early national period for providing retirement for Army officers was to appoint them to civil offices after leaving the Army. Before 1861, aging officers either remained in service until they died or resigned without pension benefits.

The impact that a lack of a retirement system had on unit effectiveness went further than just simply employing geriatric senior officers. Seniority was the foundation of the Army’s promotion system, which meant a senior officer had to leave his billet either by death or resignation before the next most senior subordinate could be promoted to take the position. With officers staying on active duty until death, wait times for promotions were stultifying long. West Point graduates in 1824 had to serve on average of thirteen years before selection to Captain. This lethargic promotion timeline led to many officers leaving the Army at the first opportunity.

1 Andrew Bacevich, Breach of Trust 48-50 (2013).


10 Id. Additionally, the War Department would sometimes allow a disabled officer to remain on the Army rolls to draw pay but with no military duty. Id. at 63.

11 Id.

12 Id.

13 Id. at 63-64. One commander of the 4th Artillery Regiment was still nominally in charge of the regiment, until the age of ninety-one when he passed away. Id. at 215. The Army now imposes mandatory retirement based on either age or a combination of years of service and rank. U.S. Dep’t of Army, Reg. 601-280, Army Retention Program para. 3-8(a) (31 Jan. 2006) requires mandatory retirement at age 55, with an exception up to age 60 possible.

14 Skelton, supra note 9, at 47.

Congress failed to establish a retirement system for officers until 1861 and the initiation of the Civil War. Officers in the Army and Navy who served forty consecutive years after 1861 could be placed on the retirement list at their request with basic pay at their current rank and four rations a day. Also, a military board could recommend to the President officers for mandatory retirements. In 1862, Congress authorized the President to retire at his own discretion officers who had forty-five years of service or those who had reached age sixty-two. Enlisted Soldiers had to wait until 1885 before Congress authorized voluntary retirement for them.

B. Development of the Modern Army Retirement

As the Army increased in size and sophistication, the military retirement system underwent further modification so that immediately prior to American intervention in World War I, the retirement system began to resemble today’s system. Retirement pay by 1916 employed a system where a service member’s years of service would be multiplied by two - and - one-half percent. In 1948, the modern retirement system utilized the adoption of twenty years of active service for a service member to vest. The reduction of active service time required before retirement was intended to ensure a youthful and vigorous force by allowing mid-level leaders the opportunity to retire early. These early retirements would create regular vacancies and ensure steady promotion for junior Soldiers, preventing some of the challenges of the previously described seniority system and lack of secure retirement.

C. Development of Personnel Review for Retirement

A rise in military personnel regulations simultaneously paralleled the increasing sophistication of the military retirement system. After World War I, the U.S. Army intermittently used a board of review for demotion and elimination to reduce and restructure the Army for peacetime,

15 Id. at 193.

16 U.S. Dep’t of Def., Military Compensation Background Papers 685-86 (6th ed. May 2005) [hereinafter Military Compensation]. In 1871, the pay plus rations formula converted to a system based on a combination of base and longevity pay. Id.

17 Skelton, supra note 9, at 216.

18 Military Compensation, supra note 16, at 695.


22 Id.
which continued until 1969. An example of a precursor to the AGDRB was the demotion of General Koster on May 18, 1971, by the Secretary of the Army, upon advice of the General Westmoreland, the Army Chief of Staff, from Major General (MG) to Brigadier General (BG). The reduction was part of an administrative process in response to allegations that General Koster, as commander of the Americal Division, had covered up allegations of the My Lai Massacre in 1968. General Koster retired from the Army in 1973 at the reduced rank of Brigadier General.

The Office of the Secretary of the Army established The Army Grade Determination Review Board (AGDRB) on July 9, 1985. The AGDRB’s purpose then and now is to determine the appropriate retirement grade for Soldiers based on service at the highest grade held satisfactorily. In 2002, the AGDRB implementing regulation changed from its original publication to ensure that the AGDRB systemically addressed officer misconduct and poor performance instead of responding ad hoc to media reports. Partly as a result of this revision, and in combination with prior downsizing, AGDRB cases have increased steadily since 2002.

III. Analysis

The AGDRB plays a vital, but little understood, role in something near and dear to every career Soldier’s heart: retirement pay. The AGDRB serves as an advisory board to the Secretary of the Army (SA) on officer grade determinations. Additionally, the AGDRB has authority to make final determinations for enlisted Soldiers at the time of separation and in thirty-year retirement cases for enlisted Soldiers and warrant officers. These grade determinations then affect an individual’s retirement or separation pay, which over the course of a lifetime can amount to hundreds of thousands — even millions — of dollars depending on the reduction.

A. Composition of the Board

The AGDRB is composed of military officers senior in rank to the individual under review and at least equal in grade to the highest grade that individual may have held. One member of the AGDRB will be at least one grade higher than the highest rank achieved by the individual under review. Typically, these boards consist of colonels and lieutenant Colonels. The members represent the different backgrounds of the Army from branch to ethnicity and gender. For a quorum, the AGDRB must have at least three members sitting. Also, the AGDRB has a senior legal


24 Koster v. United States, 685 F.2d 407, XX (1982). Appeal by BG Koster to the U.S. Court of Claims contesting a determination by the Army Board for Correction of Military Records for his reduction from Major General to BG for purpose of claiming his retirement pay. The Court upheld the reduction to BG citing traditional discretion for military decisions. Id.

25 Id.


27 Headquarters, U.S. Dep’t of Army, Gen. Order no. 1985-16 (9 July 1985). This General Order required administration by the Army Council of Review Boards. Id.

28 AR 15-80, supra note 3, at para. 2-3.

29 Interview with Mr. Jan Serene, Senior Legal Advisor to ARBA and will quickly be promoted to LTC during their assignment to ARBA.

30 E-mail from Jan Serene, Senior Legal Advisor to ARBA (Dec. 2, 2013) (on file with author). Fiscal Year (FY) 2012 Army Grade Determination Review Board (AGDRB) cases: 124 officer cases; 50 thirty-year enlisted or warrant cases; 401 disability separation/retirement grade cases. FY 2013 AGDRB cases: 225 officer cases; 68 thirty year Enlisted or Warrant cases; 553 disability separation/retirement grade cases. Each type of case is discussed infra Part III Analysis. The nearly doubling of officer cases in one year should indicate to the reader the potential effect of further downsizing in the Army in increasing the exposure of officers to the AGDRB. The most notable increase occurred from FY 2012 to FY 2013 when the number of officer cases nearly doubled. Id.

31 AR 15-80, supra note 3, at para. 1-11.


33 OFFICE OF THE SECRETARY OF DEFENSE – Military Compensation, http://militarypay.defense.gov/Calculators/Active-Duty-Retirement/High-36-Calculator/ (last visited on Oct. 15 2017). This website provides various military retirement calculators that can show retirement pay for an individual at different ranks over a selected time period. For example, using the calculator for the current high 3 retirement system from the website above, an officer retiring in 2017 with thirty years of service as an O6 could expect to receive a total compensation of $6,164,326.44 over forty years (assuming annual inflation at 2.1% and annual pay raise of 2.1%). If that same officer were reduced to O5 by the AGDRB and all else held true, that officer could expect $5,026,710. Thus, the reduction to LTC could cost the officer over $1 million dollars during the course of 40 years.

34 AR 15-80, supra note 2, at para. 2-1.

35 Id.

36 See Serene Interview, supra note 29. Majors (MAJ) who are promotable can sit on the board, though this rarely happens. Usually if the officer is a MAJ promotable, they are at the beginning of their assignment to the ARBA and will quickly be promoted to LTC during their assignment to ARBA.

37 Id.

38 AR 15-80, supra note 3, at para. 2-1.
advisor who will establish the evidence for review, provide legal advice, report recommendations made by the AGDRB, and in cases involving general officers serve as the recorder. For general officer cases before the AGDRB, the Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA (M&RA)) will appoint general officers in consultation with the Chief of Staff, Army. These general officers will be senior to the officer under consideration for reduction by the board.

The members come from a rotating pool of officers assigned to the Army Review Boards Agency (ARBA), the higher organization for the AGDRB, as their permanent duty station. ARBA serves as the Army’s final administrative review of personnel actions and conducts several boards. Thus, the members participate regularly in significant personnel actions from Army Board for Correction of Military Records to the Discharge Review Board. This permanent status and exposure to varied personnel actions gives members of the AGDRB significant institutional knowledge when reviewing individual cases. Additionally, the decision on enlisted cases does not have to be unanimous, so long as there is a majority support either for advancement or retaining the current grade. Officer grade determinations are advisory, so it is possible there could be as many separate opinions as board members.

B. Enlisted Cases

The majority of grade determinations for Soldiers do not require action by the AGDRB because they are automatic either by operation of law or as established by Army Regulation (AR) 15-80, Army Grade Determination Review Board and Grade Determinations. Under the U.S. Code, enlisted Soldiers normally will retire at the grade they held on the date of retirement. Officers have the added requirement of statutory time in grade (TIG) to serving satisfactorily at their highest grade at time of retirement.

1. Enlisted Disability Retirement or Separation Cases

The AGDRB will make final grade determinations for enlisted Soldiers who are placed on service/physical disability retirement or are separated for physical disability. In these cases, the AGDRB cannot reduce a Soldier’s current grade. Instead, the board members will either decide on advancing to a higher grade satisfactorily served by the individual or retaining that service member in his or her current grade. There has been a large increase in these types of cases since the initiation of the Global War on Terror in 2001. When reviewing disability retirement or separation cases, the AGDRB specifically looks for cases where Soldiers have been reduced in rank at some point in their career.

Typically the rank reduction will be close in time either to the injury causing the disability or during the retirement/separation process. In these cases the board members will weigh two factors heavily in determining the highest rank satisfactorily held by the Soldier: first, the seriousness of injury suffered by the Soldier, and second, the seriousness of the misconduct committed by the Soldier. The Board also will consider whether the injury or related medical reasons contributed to a reduction in grade, misconduct, or substandard performance.

2. Example Enlisted Disability Separation Cases

For example, Staff Sergeant (SSG) Jones suffers a serious head injury during his last deployment. During the SSG’s recovery, he misses multiple medical appointments. SSG Jones, having wasted the time and resources of medical

39 Id. at para. 1-10.
40 Id. at para. 1-7.
41 See Serene Interview, supra note 29.
43 U.S. DEPT’ OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (1 May 2006). The Board for Correction of military records will upon applicant’s request review military records and possibly remove or correct an error or injustice. The Board’s jurisdiction extends to any military record of the Department of the Army; see also U.S. DEPT’ OF ARMY, REG. 15-180, ARMY DISCHARGE REVIEW BOARD (20 Mar. 1998). This board will examine an applicant’s administrative discharge and potentially change the characterization and or reason for discharge based on equity or propriety.
44 See Serene Interview, supra note 29.
45 AR 15-80, supra note 3, at para. 1-11. If the officer subject to a grade determination is currently a COL or higher, then each member has a separate voting sheet. For LTC and below the members share the same vote sheet. Serene, Interview, Supra note 29.
49 AR 15-80, supra note 3, at para. 3-1.
50 Id.
51 Id.
52 See Serene Interview, supra note 29. Mr. Serene noted the increase in disability cases was due to the large-scale increase in combat wounded from operations in Iraq and Afghanistan.
53 See Id. The Board’s concern is to ensure the Soldier was not unjustly reduced as a result of service-related injuries that contributed to either misconduct or poor performance.
54 See Serene Interview, supra note 29. The temporal link between the reduction and injury is often strong corroborating evidence of a causal link between the underlying misconduct and injury. Id.
55 See Serene Interview, supra note 29; AR 15-80, supra note 23, at para. 2-4f.
56 AR 15-80, supra note 3, at para. 2-4(a).
professionals and perhaps having a less-than-stellar attitude, receives a Field Grade Article 15, which reduces him to the rank of Sergeant (SGT).57 Because of now-SGT Jones’s head injury, he is then medically separated. Considering the seriousness of his injury and the relatively minor nature of his misconduct, SGT Jones likely will have his rank advanced back to SSG for purposes of separation pay.58 Defense counsel should take note when assisting their clients with mitigation and extenuation matters and appeals of non-judicial punishment. The battle may be lost in the commander’s office, but the war could be won later at the AGDRB if a good record has been established.

3. Thirty-Year Review Cases

Additionally, the AGDRB may advance some retired members of the Army who retired before completing thirty years of service once their combined active service and time on the retired list reaches thirty years. These cases arise when the individual initiates the review upon application to the AGDRB instead of automatic review as in the case of disability retirement or separation for officers with adverse information since their last promotion.59 In thirty-year cases, the highest grade served must have been as a result of a lawful promotion and does not apply to promotable status or acting leadership positions.60 These thirty-year cases can happen generally in one of three ways: (1) reserve retirees, (2) service member who retires at current rank after reduction by Article 15 or courts-martial, or (3) service member commissioned as an officer prior to retirement but did not serve the statutory requirement of ten years.61

For reserve enlisted Soldiers, their retirements will be based on the positions they held in retirement and the ranks attained. For example, Mr. Smith, a Master Sergeant (MSG/E-8) in the U.S. Army Reserve, moves from New York to California because he is tired of shoveling snow. He is unable to find an E-8 position in the local California Reserve unit and must settle for an E-7 billet in order to drill locally. This is potentially financially disastrous because MSG Smith decides to retire the next year and as a result of holding the E-7 billet at retirement is forced to retire as a Sergeant First Class (SFC) instead of a MSG.62 The AGDRB can address this situation and restore SFC Smith to MSG rank upon his accruing thirty years and applying for redress.

In the second scenario where a Soldier retires after being reduced in rank and has now accrued thirty years, the AGDRB will consider similar factors as in the case of the disability/separation review such as the seriousness of the misconduct as well as any potential medical considerations. The board also will consider any other relevant information typically seen during administrative or criminal proceedings like evaluations, awards, and letters of support.63 Finally, it is possible for a Soldier—after being commissioned as an officer—to be forced to retire at his highest enlisted rank if she does not have ten years of service as a commissioned officer.64

In these cases, the AGDRB will review the Soldier’s service record and potentially advance the Soldier to the highest commissioned grade if appropriate. However, it is sometimes possible for an individual to apply for advancement on the retired list to a commissioned rank and potentially receive a diminished retirement pay.65 For example, an E-7 with over 24 years of service will earn more retirement pay than an O-1E with similar years of service.66 When such an anomaly occurs, the AGDRB will notify the individual of the projected loss in pay and allow the applicant to withdraw the application.67

C. Officer Cases

Officers, in contrast to enlisted personnel, are not automatically entitled to retire at the highest grade they have reached while on active duty. Instead, the review board will determine the highest grade the officer served satisfactorily on active duty. The AGDRB makes advisory recommendations on officers below the rank of Brigadier General to the Deputy Assistant Secretary of the Army (Review Boards) (DASA (RB)).68 Secretary of the Army retains sole authority to make discretionary grade

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57 Congress created this Article 15 reduction authority under 10 U.S.C. § 815 (b)(2)(D) and (H).
58 See Serene Interview, supra note 29. This scenario presumes of course that SSG Jones had no other serious misconduct during his career. Another factor for consideration on misconduct was the grade at which it was committed per AR 15-80, para. 2-4(g). Thus, if SSG Jones had minor misconduct as a PFC 6 years prior, it will likely be heavily discounted. Additionally, the board will look favorably on a service member deployment history, especially if the injury occurred during that time.
59 AR 15-80, supra note 3, at para. 3-2(a).
60 Id. at para. 3-2(a).
61 10 U.S.C.§ 3911(a) (2011). However, 10 U.S.C. § 3911(b) permits the Secretary of Defense to reduce the 10 year requirement of active service as a commissioned officer to a period of no less than 8 years. The window for this reduced requirement exists from January 7, 2011, through September 30, 2018. So a Soldier who spends 16 years of active service enlisted and then does a final 4 years as an officer will not be able to retire as officer and instead will revert to their highest enlisted rank.
62 See Serene Interview, supra note 29.
63 Id. AR 15-80, supra note 3, at para. 2-8.
64 10 U.S.C. § 3911(a).
65 AR 15-80, supra note 3, at para. 3-2.
67 AR 15-80, supra note 3, at para. 3-2(c).
68 Id. at para. 4-1.
determinations of general officers retiring. Officers seeking to retire as Lieutenants General or Generals additionally must have certification from the Secretary of Defense to the President and Congress that they served satisfactorily at that rank.

1. Criteria for Satisfactorily Served

The AGDRB is an administrative tool and is not intended to serve a punitive function. It does, however, address the commander’s inability to reduce an officer through military justice mechanisms. This administrative measure ensures some level of balance in the retirement system between enlisted Soldiers, who can suffer rank reductions in a plethora of ways and still retire, and officers, who cannot be reduced through other means. So although not punitive, the AGDRB decision can be based on criminal findings and has significant and long-lasting impact on an individual by determining his or her retirement grade or separation pay. The laundry list enumerates a number of factors that the AGDRB uses to find satisfactory service, to include: compassionate circumstances; length of TIG cannot be waived by the AGDRB, for example, Lieutenant Colonels must have 3 years in grade according to 10 U.S.C. § 1370; performance as indicated by evaluation reports; nature and severity of misconduct; and the grade at which misconduct was committed. Where service in the highest grade is held to be unsatisfactory, the Soldier will be reduced to the next lower grade held satisfactorily.

2. Example of a Senior Officer Case

Using an example from the Air Force to illustrate how its version of the AGDRB functions for misconduct by a senior officer is quite instructive because the Army and Air Force systems are generally the same; moreover, the misconduct in this example occurred at the highest level of Air Force legal channels. Major General (MG) Thomas Fiscus was the Judge Advocate General for the Air Force from February 2002 until September 2004, when he asked to be relieved. He received a General Officer Article 15 under the Uniform Code of Military Justice (UCMJ) for conduct unbecoming, fraternization, obstruction of justice, and violating a lawful general regulation. This occurred after an investigation determined he had multiple inappropriate relationships with female subordinate judge advocates, paralegals, and federal civilians. In accordance with 10 U.S.C. § 1370, the Secretary of the Air Force reduced MG Fiscus to Colonel (O-6) as the last satisfactorily held rank upon retirement in 2005, resulting in potentially up to $900,000 in lost retirement pay.

IV. Recommendations

There are three primary ways the AGDRB likely will apply to the practice for judge advocates: (1) when the Army has to downsize its force structure, which has occurred throughout the Army’s history, commanders may recommend increasing numbers of show cause boards for officers — even those with fifteen years or more of active service; (2) legal assistance attorneys representing clients for adverse administrative actions like GOMOR; (3) TDS attorneys representing clients in criminal proceedings.

A. Adverse Information

All retirements involving officers who have received an adverse finding from an official investigation subsequent to their last promotion automatically will be forwarded to the Assistant Secretary for Manpower and Reserve affairs for a grade determination review. Accordingly, every officer who receives a GOMOR, an Article 15, a founded Inspector General investigation, or a conviction (court-martial or civilian) in their highest grade before retirement will likely be subject to a potential demotion in rank for retirement. This consequence has significant repercussions when considering the possibility of an increase in show cause boards should the Army attempt to reduce personnel en masse. The adverse information thus can start a self-reinforcing cycle, which may cause an officer to fail to be promoted and/or a show cause board initiated either by the Commanding General or HRC after a selection board.

Murphy, who served as a JA in the Air Force and reached the rank of COL despite not having a state bar license during his entire military career. He was thus reduced to the rank of 1st LT as the last rank he satisfactorily held. See Bruce Rolfsen, Troubled Colonel Busted to O-2 When Booted, Air Force Times, Mar. 13, 2010, http://www.airforcetimes.com/article/20100313/NEWS/3130330/Troubled-colonel-busted-O-2-when-booted. See also Sinclair, supra note 7.

B. Use of GOMOR

For officers, the AGDRB recommendation is advisory to the SA or the SA’s delegate. In the cases of enlisted personnel only, the AGDRB may also consider as an additional factor any medical reasons that may have contributed in a reduction in grade. Id.

Josh White, General is Sanctioned for ‘Unprofessional’ Affairs, WASH. POST, Jan. 11, 2005, at A13. The investigation determined the inappropriate relationships occurred at both the BG and MG rank for COL(R) Fiscus. Consider also the example of 1st LT(R) Michael D Murphy, who served as a JA in the Air Force and reached the rank of COL despite not having a state bar license during his entire military career. He was thus reduced to the rank of 1st LT as the last rank he satisfactorily held. See Bruce Rolfsen, Troubled Colonel Busted to O-2 When Booted, Air Force Times, Mar. 13, 2010, http://www.airforcetimes.com/article/20100313/NEWS/3130330/Troubled-colonel-busted-O-2-when-booted. See also Sinclair, supra note 7.

AR 15-80, supra note 3, at para. 4-1(d). This obviously creates a somewhat subject standard that
Moreover, considering the increasingly competitive promotion rates for Army officers, derogatory information likely will prevent further promotion. Failure to advance in rank will make a grade review by the AGDRB automatic if the officer is lucky enough to accrue sufficient time to retire.

Additionally, the Temporary Early Retirement Authority (TERA) granted by Congress in the Fiscal Year 2012 National Defense Authorization Act (NDAA) creates further complexity by potentially increasing the total number of eligible retirements for service members. TERA authorizes service members who were non-selected for promotion but have at least fifteen years of active service to be eligible for early retirement so long as they are not facing administrative separation. This additional retirement authority can create complex fact patterns that can be challenging for judge advocates to provide clear and concise advice for clients and commanders. These early retirement situations also often present difficult and emotional choices for commanders regarding the financial fates of subordinate officers. For those judge advocates who work for the command, understanding and being able to explain to commanders the role and function of the AGDRB can provide these line officers with greater understanding and possibly more options with respect to the decisions they make.

B. Major Adams AGDRB Hypothetical

The following hypothetical provides greater context for the practical application of the law: Army Major Bob Adams has received a GOMOR for an inappropriate relationship with a senior enlisted Soldier in a different unit. Major Adams otherwise has earned stellar marks in his evaluations and was held in high regard by the command. Now, MAJ Adams faces the possibility that his Commanding General (CG) will initiate a show cause board. The CG may want to allow HRC to initiate the show cause board to give MAJ Adams either the possibility of avoiding a board entirely, or more likely, additional evaluation time to make MAJ Adams more competitive for a selection board or retainable for a subsequent HRC board. However, there is another consideration for the CG: additional evaluation time could prevent MAJ Adams from demotion to a lower rank by the AGDRB, if MAJ Adams is retirement eligible. Intuitively, the AGDRB will look more favorably on retaining MAJ Adams’s current rank for retirement if he has a strong record of service at that rank to counterbalance his GOMOR for an inappropriate relationship. Clearly, there is a grade determination benefit for clients in this position to obtain continued, preferably lengthy service post-derogatory information.

1. Command Counsel

Continuing with the hypothetical, MAJ Adams’s luck does run out, and now he is facing a show cause board initiated by HRC. Major Adams has over fifteen years of active service and would like to voluntarily retire. To retire under TERA, however, MAJ Adams cannot be facing a show cause board for separation. MAJ Adams will now almost certainly request to retire early and have HRC terminate the show cause board. This request would appear to force the command into choosing between two disparate options: (1) possible separation through show cause board and no retirement benefits (although potentially separation pay) or (2) stopping the show cause board and allowing early retirement.

Faced with such a stark choice, many commanders are likely to wrestle with this type of decision that will have a major financial impact on their subordinate. Should an otherwise stellar officer be denied retirement benefits for an offense that would not be chargeable in the civilian world such as adultery? On the other hand, should MAJ Adams be allowed to retire early at his current rank and suffer what would appear to be a slap on the wrist, when for the same
offense, an enlisted member could likely suffer rank reduction at an Article 15 hearing.90

Knowledge of the AGDRB process can prove useful to the chain of command when looking at these sorts of conundrums. The chain of command can recommend termination of the show cause board allowing possible early retirement for MAJ Adams.91 This recommendation would allow for a balanced approach by ensuring that MAJ Adams still has the chance for retirement benefits after his lengthy service, but in fact is also more likely to have a rank reduction for his previous misconduct at the AGDRB.

2. Legal Assistance and Trial Defense Service Counsel

That Major Adams would be more likely to end up retiring as a captain if he voluntarily retires as opposed to going through the separation board is something TDS as well as legal assistance attorneys should consider. The AGDRB will view an officer’s grade determination more sympathetically where the officer is forced to retire as the result of a show cause board than if the individual retires shortly after receiving negative information in his Official Management Personnel File (OMPF).92 This could be simply because the officer forced to retire after a show cause board presumably has more time for rehabilitation after the negative information than someone who retires immediately after misconduct. There also may be subjective judgments being made by board members on the officer’s desire to continue service after receiving negative information.

Thus, clients who received negative information in their OMPF at their current rank should be advised to delay retirement if at all possible to provide the strongest case to the AGDRB.93 Additionally, counsel should contact the authority issuing the negative information to address the possibility of a rank reduction at the AGDRB. A GCMCA authority may have issued a GOMOR for an officer’s misconduct or poor performance but would not necessarily want that officer reduced later for the same misconduct. This could be because the GCMCA felt that either the misconduct was addressed sufficiently by the original reprimand or subsequent performance has rehabilitated the individual in the eyes of the issuing authority. Letters from the issuing GCMCA or chain of command supporting retaining an officer’s current rank for retirement carry strong weight with the AGDRB.94

Counsel also may want to broach the subject of a grade determination with the GCMCA during the rebuttal phase. This information could be utilized as an additional reason to place a GOMOR in the restricted file or raise the possibility of a subsequent letter of support in future proceedings. In addition to the length of time since misconduct and letters of support, the AGDRB also will consider the officer’s evaluations and deployment history.95 So counsel, whether in legal assistance or TDS, should focus on their client’s performance history and ways to buttress and document that performance before retirement. There is no right to be heard by the AGDRB in person, so providing the strongest possible case file is crucial for officers facing a grade determination by the AGDRB.96

V. Conclusion

Development of retirement benefits has been an integral part of the Army’s effort over the previous two hundred plus years to modernize and professionalize the force. Retirement benefits serve as an incentive for continued service by qualified Soldiers as well as a tool by the Army to ensure an active and healthy force. The AGDRB is a relatively recent innovation designed to advance the separate but related goals of restoration of rank for enlisted members and reduction of rank for officers. Thus, the AGDRB may significantly impact either positively or negatively on Soldiers within Army units and installations.97

The potential impact of the AGDRB depends on whether a Soldier is enlisted or an officer. For enlisted, the AGDRB serves as a forum for potential redress and increase in rank for service members who retired medically, are separated, or have spent a total of thirty years on active duty and the retired list. If the AGDRB deems the Soldier’s rank reduction to have been unreasonable, it may restore the Soldier to a higher previously held rank. For officers, the AGDRB serves as a forum to address misconduct or poor performance with the potential to reduce the officers rank to the highest rank

90 See Military Corruption, Top Air Force JAG Officer hypocrite and serial sex abuser of women gets “slap on the wrist” (Mar. 20, 2014, 11:06 pm) http://www.militarycorruption.com/fiscus2.htm. This website decries the injustice of Maj Gen Fiscus being reduced to O-6 while another lower-ranking officer received jail time for an adultery case. The article alleges the GCMCA felt that either the misconduct was addressed sufficiently by the original reprimand or subsequent performance has rehabilitated the individual in the eyes of the issuing authority. Letters from the issuing GCMCA or chain of command supporting retaining an officer’s current rank for retirement carry strong weight with the AGDRB.94

91 See AR 600-8-24, supra note 5, at para. 4-11(b)(1).
92 See Serene Interview, supra note 29.
93 Counsel may decide this is not the best tactic if they believe their client will continue to have difficulties either with performance or with military justice concerns.
94 See Serene Interview, supra note 29.
95 Id.
96 AR 15-80, supra note 3, at para. 2-8.
97 With the threat of the Army reverting to separating Soldiers at some future point when the Army downsizes again, the scope of the AGDRB is likely to increase in the future, impacting an even larger segment of the military. Robert Burns, Hagel Proposes Downsizing Army to Smallest Size in Decades, ASSOCIATED PRESS, Feb. 24, 2014, http://www.pbs.org/newshour/rundown/hagel-propose-downsizing-army-smallest-size-decades.
satisfactorily held. This negative function for officers is intended to address the Army’s inability to otherwise reduce officers.  

By addressing both unfair rank reductions for enlisted and misconduct or poor performance by officers, the AGDRB strengthens the legitimacy of the Army’s retirement system, which is the current bedrock of the Army professional volunteer force.

Counsel for commanders and Soldiers would be well-served by delving into the AGDRB process. Such knowledge allows government counsel to give their commanders more options for separating officers as well as a deeper understanding of the Army’s separation and administrative remedies. Conversely, understanding the AGDRB process and impact helps TDS and legal assistance counsel mitigate long-term damage caused by reprimands or other adverse information prior to retirement or separation.

98 See Serene Interview, supra note 29. For officers there is no other mechanism for rank reduction, unlike the enlisted members where the Army has a several mechanisms to achieve reduction.