

ADDENDUM TO
RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

FEB 24 1999

IN THE MATTER OF:

DOCKET NUMBER: 94-04101

COUNSEL: NONE

HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

His nonselections for promotion to lieutenant colonel be set aside; that his CY91B (P0591B) Lieutenant Colonel Promotion Recommendation Form (PRF) be upgraded to a Definitely Promote; and, that he be granted promotion to lieutenant colonel.

RESUME OF CASE:

On 17 August 1995, the Board considered and approved the applicant's request that his PRF for the P0591B Lieutenant Colonel Selection Board be replaced with a reaccomplished "Promote" PRF and that he be afforded Special Selection Board (SSB) consideration. A summary of the evidence considered by the Board and the rationale for its decision is set forth in the Record of Proceedings, AFBCMR 94-04101, which is attached at Exhibit G.

On 2 December 1996, the applicant requested the Board reconsider his request based on new evidence. Applicant is asserting that the Board failed to provide complete relief in its original decision, and that the promotion selection boards that considered his record were not held in compliance with law and directive (Exhibit H).

APPLICANT CONTENDS THAT:

The Board erred by not setting aside the promotion nonselection he had incurred at the original selection board.

Even though his CY91 PRF was upgraded from a "Do Not Promote This Board" to a "Promote," he was not granted fair consideration because his Management Level Evaluation Board (MLEB) was never allowed to review his PRF during a quality review phase.

The SSB process is contrary to statute; a required quorum was not present; the illegal original boards flawed the SSB benchmarks; and, the scoring system is clearly arbitrary and capricious.

In further support of his appeal, he has provided additional documents associated with the issues cited in his contentions (Exhibit H).

STATEMENT OF FACTS:

The applicant has five promotion nonselections to the grade of lieutenant colonel by the following Lieutenant Colonel Selection Boards: CY 91B (2 Dec 91), CY92B (16 Nov 92), CY93A (12 Oct 93), CY94A (11 Oct 94), and CY 96C (8 Jul 96).

The applicant was considered and nonselected for promotion to the grade of lieutenant colonel by a Special Selection Board (SSB), which convened on 25 March 1996, for the CY91B Lieutenant Colonel Selection Board.

On 5 August 1996, the applicant submitted a request for voluntary retirement, effective 1 December 1996. On 30 November 1996, the applicant was relieved from active duty in the grade of major under the provisions of AFI 36-3203 (Maximum Service or Time-In-Grade). Applicant was subsequently retired in the grade of major, effective 1 December 1996. He had completed a total of 20 years of active service for retirement.

AIR FORCE EVALUATION:

The **Air Force Evaluations Board Recorder, HQ AFPC/DPPPEB**, provided a technical review of the case. DPPPEB stated that the purpose of the Management Level Evaluation Board (MLEB) quality review phase is to merely confirm the "Definitely Promote" recommendations are awarded to "Definitely Promote" quality records; however, they cannot make senior raters change their promotion recommendations. The quality review phase can merely make suggestions to a senior rater. The overall promotion recommendation and the content of the PRF is solely the responsibility of the senior rater. DPPPEB stated that unless the applicant provides evidence to the contrary, this contention is without merit. In order to have a PRF rating upgraded, it requires both the concurrence of the senior rater and the MLEB president, who would provide a quality review look at that time. Since the applicant's PRF was upgraded to a "Promote," DPPPEB assumes this review was accomplished. The applicant provides no support from either his senior rater or MLEB president that his record warrants a "Definitely Promote" recommendation. Unless further evidence is provided, DPPPEB recommended the applicant's "Promote" recommendation stand (Exhibit I).

The **Selection Board Secretariat, HQ AFPC/DPPB**, stated that the statute does not address the issue of voting/nonvoting members. The applicant's central boards and SSBs were in compliance with the statute. Applicant's claim that the SSB benchmark records are tainted is without merit. The benchmark records used in the SSB process are selected in accordance with applicable

directives. The scoring system used during the SSB process is the exact same one used on the central board process and is in keeping with governing directives. DPPB disagrees with the applicant's numerous accusations that the Air Force's promotion board process is in violation of 10 U.S.C. It has been determined that the process and procedures comply with applicable policy (Exhibit J).

The **Senior Attorney-Advisor, HQ AFPC/JA**, reviewed the applicant's request for reconsideration and recommended denial. JA stated that by regulation, the only basis upon which an application can be reconsidered is if and when the applicant submits "newly discovered relevant evidence that was not available when the application was previously considered." The applicant has submitted nothing that meets this "criterion;" his brief offers no new evidence, but only a series of arguments supported almost exclusively by the author's opinions. It is JA's opinion that the applicant has failed to meet the requisite regulatory standard for reconsideration.

JA opines that the applicant has failed to prove an error or injustice warranting relief. The applicant claims error because the AFBCMR afforded him **exactly** what he requested in his initial request. Notwithstanding, he now claims he was not afforded full and fitting relief because his nonselections for promotion by the CY91B and later lieutenant colonel boards were not set aside. Traditionally, this Board has not voided promotion nonselections upon the determination of an error in the record warranting special selection board consideration in accordance with 10 U.S.C., Section 628. Indeed, "it is well settled that the mere voidance of OERs does not mandate voidance of prior passovers...." JA would submit that the same holds true for the voidance of a PRF.

JA provided a detailed response to the applicant's numerous contentions concerning MLEB procedures, SSBs being contrary to statute and DoD Directive; and, his request for direct promotion.

For the reasons outlined in the evaluation, it is JA's opinion that the applicant's request for reconsideration should be denied since he has failed to meet the requisite criteria for reconsideration; and, on the merits, the applicant has failed to present relevant evidence of any error or injustice warranting relief.

A complete copy of this evaluation is appended at Exhibit K.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

AFPC/JA does not explain how documents like the Roane decision or any information about the selection board process (upon which it relies) were available. This is a major problem for AFPC, particularly the lack of standard operating procedures (SOPs) for selection board operations and support. The "Quality Review

Process" detailed in his package was not even mentioned in any regulation until **1996!** He has provided evidence and AFPC has provided nothing, although such documentation is not only required to exist, but to have been approved by SAF.

He again believes the evidence is clear. When the Board directed correction of his PRF, the Board should also have directed set aside of all the nonselections he had received to lieutenant colonel. He therefore asks the Board to direct set aside of his nonselections and upgrade his PRF to a "Definitely Promote" recommendation. While he acknowledges senior raters may add their "own" stratification comments, i.e., how the senior rater believes the officer ranked among his review group, there is absolutely no provision for MAJCOM indorsement or 'special' promote recommendations. As the evidence demonstrated the 'special' promote recommendations effectively 'took away' promotions from officers who receive legitimate promote recommendations, there is no way his record can compete on a fair and equitable basis. He therefore asks the Board to upgrade his PRF for the **94** Colonel Boards to a "Definitely Promote" recommendation. The statute does not address the issue of voting/nonvoting members. Common sense, however, dictates that the quorum requirement was for the voting membership as the board president is limited to "administrative duties" approved by the SAF. In effect, AFPC is advocating an "election" without "registered voters" - which is certainly not contemplated by statute. He did not claim the benchmark records were selected in violation of regulation, rather that they were chosen arbitrary and capriciously. AFPC however avoids that issue.

Based upon the evidence and the facts, he must conclude the SSBs which considered his record were held contrary to law. Additionally, given the clear errors at the original board detailed in his response, the SSB process does not present a viable avenue for resolution of his case. He therefore asks the Board to not only set aside the nonselections, he also asks the Board to correct his record to reflect selection for promotion to lieutenant colonel by the **CY91B** Lieutenant Colonel Selection Board.

A complete copy of this response is appended at Exhibit M.

THE BOARD CONCLUDES THAT:

1. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. We have carefully considered the applicant's request and his most recent submission in judging the merits of the case. In this respect, we find insufficient evidence which would lead us to believe that the applicant's consideration for promotion to the grade of lieutenant colonel was contrary to the pertinent provisions of the governing regulation, which implements the law. The applicant's numerous contentions concerning his nonselections for promotion to lieutenant colonel, upgrade of his P0591B

Promotion Recommendation Form (PRF), the statutory compliance of central selection boards, the legality of the promotion recommendation process, and the legality of the SSB process have been duly noted. However, we find that the detailed comments by the appropriate Air Force offices adequately address these issues. The applicant has provided no evidence which successfully disputes HQ AFPC/JA'S interpretation of law or showing that he was inequitably treated when compared to other similarly situated officers. We therefore agree with the opinions and recommendations of the respective Air Force offices and adopt the rationale expressed as the basis for our conclusion that the applicant failed to sustain his burden of establishing the existence of either an error or an injustice warranting favorable action on this application.

2. The applicant's case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issue(s) involved. Therefore, the request for a hearing is not favorably considered.

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 14 October 1998, under the provisions of AFI 36-2603:

Mr. Thomas S. Markiewicz, Panel Chair
Mr. Charles E. Bennett, Member
Ms. Martha Maust, Member

The following documentary evidence was considered:

- Exhibit G. Record of Proceedings, dated 19 Sep 95.
- Exhibit H. Letter from applicant, dated 2 Dec 96, w/atchs.
- Exhibit I. Letter, HQ AFPC/DPPPEB, dated 16 Oct 97.
- Exhibit J. Letter, HQ AFPC/DPPB, dated 5 Feb 98.
- Exhibit K. Letter, HQ AFPC/JA, dated 16 Apr 98.
- Exhibit L. Letter, SAF/MIBR, dated 22 Apr 98.
- Exhibit M. Letter from applicant, dated 22 Jun 98, w/atchs.


THOMAS S. MARKIEWICZ
Panel Chair