



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

FEB 12 1999

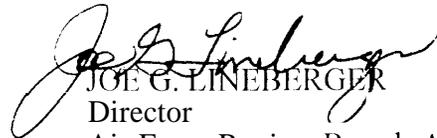
Office of the Assistant Secretary

AFBCMR 96-01380

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Air Force Board for Correction of Military Records and under the authority of Section 1552, Title 10, United States Code (70A Stat 116), it is directed that:

The pertinent military records of the Department of the Air Force relating to [REDACTED] be corrected to show that he be considered for promotion to the grade of colonel by a Special Selection Board for the Calendar Year 1997A Central Colonel Board.


JOE G. LINEBERGER

Director
Air Force Review Boards Agency

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

FEB 12 1999

IN THE MATTER OF:

DOCKET NUMBER: 96-01380

[REDACTED]
COUNSEL: None

[REDACTED]
HEARING DESIRED: No

APPLICANT REQUESTS THAT:

He be promoted to the grade of colonel or, in the alternative, he be given the opportunity to compete for promotion to the grade of colonel before a Special Selection Board (SSB).

APPLICANT CONTENDS THAT:

The SSB held on 13 January 1997 was improperly constituted. He was considered and not selected for promotion to colonel by the Calendar Year 1995 (CY95) Central Colonel Selection Board on 10 October 1995. Judge Advocate members of the board were [REDACTED]. Because of errors in his record, he was granted an SSB that convened on 13 January 1997 (CY97A). Judge advocate members were [REDACTED] and [REDACTED]. He was not selected for promotion. The fact that [REDACTED] served on both boards contravenes the intent and spirit of paragraph 2.3.4 of AFI 36-2501.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

The applicant is currently serving on extended active duty in the grade of lieutenant colonel.

Applicant was considered and not selected for promotion to the grade of colonel by the CY95 (10 October 1995) and CY97B (15 September 1997) Central Selection Boards.

Applicant was reconsidered and not selected for promotion to the grade of colonel by SSB for the CY97A (13 January 1997) board.

OPR profile since 1995, follows:

	<u>PERIOD ENDING</u>	<u>EVALUATION OF POTENTIAL</u>
#	27 Feb 95	Meets Standards
	27 Feb 96	Meets Standards
	27 Feb 97	Meets Standards
##	25 Aug 97	Meets Standards

Top report at time of CY95 board.

Top report at time of CY97B board.

On 14 April 1998, the Air Force Board for Correction of Military Records (AFBCMR) considered, and granted, a similar case (TAB 1).

AIR FORCE EVALUATION:

The Chief of Ops, Selection Board Secretariat, Directorate of Personnel Program Mgt, AFPC/DPPB, reviewed the application and states that the applicant's request for reconsideration for promotion to the grade of colonel via SSB is without merit. Nothing in the statutes, DoD directives/instructions, or Air Force policy precludes an officer that served on a central promotion board from subsequently serving on an SSB for that central board. Therefore, they recommend denial of applicant's request.

A complete copy of the Air Force evaluation is attached at Exhibit C.

The Staff Judge Advocate, AFPC/JA, reviewed the application and states that the applicant contends the presence of the same officer on his central selection board and his SSB requires finding the SSB to have been, illegally constituted. They disagree. The applicant cites paragraph 2.3.4, AFI 36-2501 (1 March 1996), in support of his position. That paragraph states:

An officer cannot serve as a member of two successive boards considering officers of the same competitive category and grade (except for SSBs when the second board is not considering the same officer or officers).

This paragraph prohibits an officer from serving on two successive boards, except in the case of SSBs, where an officer may serve on successive boards so long as the later boards do not consider the same officer or group of officers. Paragraph 6.1 describes SSBs as compared to selection boards: "SSBs replicate central selection boards, to include pre- and post-board procedures and policies as outlined in Chapters 1 through 5 of this instruction, to the maximum extent possible. Paragraph 9b, AFR 36-89 (17 April 1992), the predecessor to the current AFI

paragraph stated, "No officer may be a member of two successive boards for considering officers of the same competitive category and grade." Paragraph 31 stated, "...SSBs replicate central selection boards to the maximum extent possible." Paragraph 35 (SSB Composition and Procedures) went on to say, "Boards will consist of officers who are qualified as prescribed in paragraph 9...." Paragraph 2.3.4 clarified the circumstances under which an officer could serve on successive SSBs - that is, when the second board (SSB) was not Considering the same officer or group of officers. The question which remained, however, even in view of both the AFR's and the AFI's comments regarding replication of the selection board by the SSB, was whether the prohibition against serving on two successive boards applied to service by an officer on an SSB who had previously served on a selection board for the same officer. This question was addressed in OpJAGAF 1994/13, 10 February 1994, in a case involving facts virtually identical to this case:

...[T]he applicant now contends the SSB...was in violation of 10 U.S.C. 612(b), which states "[n]o officer may be a member of two successive selection boards convened under section 611(a) of this title for the consideration of officers of the same competitive category and grade. The applicant alleges this prohibition also applies to SSBs. He bases his contention on section [628(b)(1)], which according to the applicant, applies the section 612(b) requirement to SSBs....[S]ubsection (b)(1)...states:

In the case of an officer who is eligible for promotion who was considered for promotion by a selection board but was not selected, the Secretary of the military department concerned . . . may convene a special selection board under this subsection (composed in accordance with section 612 of this title . . .) to determine whether such officer should be recommended for promotion if the Secretary concerned determines that (the action of the previous board was illegal or involved material error or incomplete information).

In other words, the applicant argues that an officer who sits on a regular selection board is disqualified from sitting on a successive SSB for the same competitive category and grade....

We do not agree with the applicants (sic) construction of 10 U.S.C. 628(b)(1) to the effect that an officer who was a member of a regular selection board is prohibited from sitting on a successive SSB. The prohibition is that "[n]o officer may be a member of two successive selection boards convened under section 611(a) of this title...(10 U.S.C. 612(b)). This specific reference to section 611(a) was not in the statute as originally adopted in 1980. Rather the section was amended in 1981 to add the reference. 10 U.S.C. 611(a) does not refer to

SSBs, but to regular selection boards. SSBs are covered by section 628. If Congress had intended section 612(b) to extend to SSBs, it easily could have said so, either in the original legislation or in the 1981 amendment. Instead, Congress chose to expressly limit the sections [sic] effect to regular boards convened under section 611(a). Therefore, we do not believe Congress intended its mandate that SSBs be "composed in accordance with section 612" to prohibit a member of a regular board from sitting on a succeeding SSB convened for the same competitive category and grade.

In their view, the rationale above is dispositive of this applicant's case, and they agree with it. Notwithstanding their view of the law in this matter, they have been made aware of the fact that another case before the AFBCMR involving an individual with facts exactly the same as the applicant's, was recently resolved in that applicant's favor by granting him consideration for promotion to the grade of colonel by SSB for the CY97A SSB. The applicant in this case has requested similar relief so as to offset any possibility of an injustice. While it would not be contrary to the law should the AFBCMR deny the relief requested by this applicant, they nevertheless believe that officers who are truly similarly situated should generally be treated in a similar manner. In light of the relief accorded the earlier applicant, contrary adjudication in this case (even though it would be fully supported by the law) could be viewed as unjust. It is their opinion that this application can be denied as a matter of law because the applicant has failed to present relevant evidence of any legal error. However, given the Board's action in the earlier BCMR application, it would not be inappropriate to grant the relief requested in this case.

A complete copy of the Air Force evaluation is attached at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Complete copies of the Air Force evaluations were forwarded to the applicant on 14 September 1998, for review and response. As of this date, no response has been received by this office.

THE BOARD CONCLUDES THAT:

- i. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.

3. Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice warranting consideration for promotion to the grade of colonel by the CY97A SSB. While we cannot conclusively determine that the presence of the same officer on his central selection board and his SSB was the reason for the applicant's nonselection for promotion to the grade of colonel by the CY97A SSB, we believe it may have served to deprive him of full and fair consideration. In order to offset any possibility of an injustice to the applicant, we believe his record should be considered by an SSB for the CY97A SSB. In regard to his request for direct promotion to the grade of colonel, we believe that a duly constituted selection board is in the most advantageous position to render this determination and that its prerogative to do so should only be usurped under the most extraordinary circumstances. Accordingly, his request for direct promotion is denied.

THE BOARD RECOMMENDS THAT:

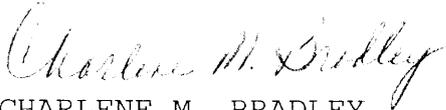
The pertinent military records of the Department of the Air Force relating to APPLICANT, be considered for promotion to the grade of colonel by an SSB for the CY97A Central Colonel Board.

The following members of the Board considered this application in Executive Session on 16 December 1998 under the provisions of AFI 36-2603:

Ms. Charlene M. Bradley, Panel Chair
 Mr. Terry A. Yonkers, Member
 Ms. Peggy E. Gordon, Member
 Ms. Gloria J. Williams, Examiner (without vote)

All members voted to correct the records, as recommended. The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 7 July 1998.
 Exhibit B. Applicant's Master Personnel Records.
 Exhibit C. Letter, AFPC/DPPB, dated 27 July 1998.
 Exhibit D. Letter, AFPC/JA, dated 31 August 1998.
 Exhibit E. Letter, AFBCMR, 14 September 1998.


 CHARLENE M. BRADLEY
 Panel Chair