



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

OCT 20 1998

Office of the Assistant Secretary

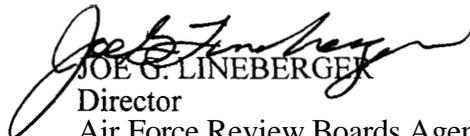
AFBCMR 97-02561

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:

- a. On 2 January 1985, he was not appointed a Reserve of the Air Force.
- b. On 12 September 1995, he was tendered and accepted an appointment as a Captain, Reserve of the Air Force, with a promotion service date and promotion effective date of 1 August 1992.
- c. He was not considered for promotion to the Reserve grade of major by the Fiscal Years 1997 and 1998 Major Selection Boards.
- d. He was not transferred to Headquarters Air Reserve Personnel Center Non-affiliated Reserve Section (NARS/NA), effective 11 September 1997, but on that date, continued to serve in his assignment, [REDACTED] Support Group/DPMPS, [REDACTED]
- e. Reserve Order [REDACTED] dated 8 August 1998, be, and hereby is, revoked.
- f. He was credited with 35 non-paid Inactive Duty Training (IDT) points and 15 membership points during the retirement/retention year 12 September 1997 through 11 September 1998, resulting in 50 total points; and, that the period 12 September 1997 through 11 September 1998 is a year of satisfactory Federal service.


JOE G. LINEBERGER
Director
Air Force Review Boards Agency

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

OCT 20 1998

IN THE MATTER OF:

DOCKET NUMBER: 97-02561

COUNSEL: NONE

HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

1. His records be corrected to reflect a ten-year break in service, from 1 January 1985 through 12 September 1995.
2. His two nonselections for promotion to the grade of major, for the Fiscal Year 1997 (FY97) and FY98 Reserve Major Promotion Boards, be set aside.
3. The Officer Effectiveness Report (OER), for the period 1 November 1983 through 31 October 1984, be declared void and removed from his records.
4. His service dates, including his promotion service date (PSD), be adjusted.
5. He receive point credits for appropriate participation in the Air Force Reserve retroactive to 11 September 1997 and also credit for a good year of satisfactory Federal service.

APPLICANT CONTENDS THAT:

Following an administrative correction to his record in July 1995, his record now does not reflect an appropriate break in service from January 1985 through September 1995. Therefore, his Officer Selection Brief (OSB), at the FY97 and FY98 major promotion board incorrectly reflected several non-participating years. Applicant states that he did not come back into active status until September 1995 and was not on active status the requisite one continuous year prior to meeting the promotion board. Therefore, his record only showed one current Officer Performance Report (OPR), no "good" participation year, and no current awards or decorations. Also, his service dates are incorrectly stated and need to be adjusted.

Applicant's submission is attached at Exhibit A.

STATEMENT OF FACTS:

The relevant facts pertaining to this application, extracted from the applicant's military records, are contained in the letter prepared by the appropriate office of the Air Force Office of Primary Responsibility (OPR). Accordingly, there is no need to recite these facts in this Record of Proceedings.

AIR FORCE EVALUATION:

The Director of Assignments and Readiness, HQ ARPC/DA, states that after review of the applicant's original request for appointment, they have concluded that he did not understand the repercussions of requesting appointment without the ten-year break in service. They recommend approval of applicant's requests.

A complete copy of this evaluation, with attachments, is attached at Exhibit C.

The Acting Chief, Appeals and SSB Branch, HQ AFPC/DPPPA, states that with regard to the removal of the 31 October 1984 OER, the applicant contends he did not request an OER at his date of separation (DOS) and that it is substandard because it was written after he had submitted his DOS from active duty. There is no provision in AFR 36-10 for the ratee to request an OER after he or she has applied for separation from active duty. The regulation states that if the report is required as a result of the separation, retirement, or permanent change of station (PCS) reassignment of the rater or, PCS or separation of the ratee, the report is usually closed out 30 calendar days before the rater or ratee's departure date. In the applicant's case, the contested OER was an annual report, and it closed out well in advance of his date of separation of 1 January 1985. The applicant has provided nothing to substantiate the contested OER is inaccurate as written. They recommend applicant's request to remove the OER be denied.

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

The Staff Judge Advocate, HQ AFPC/JA, reviewed the application and believes that the relief sought by the applicant (with the exception of his request that his 1984 OER be removed) should be granted and the actions recommended by HQ ARPC/DA be taken in this case.

A complete copy of this evaluation is attached at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Copies of the Air Force evaluations were forwarded to the applicant on 7 July 1998 for review and response within 30 days. As of this date, no response has been received by this office.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed with regard to a majority of applicant's requests. However, the application was not timely filed with regard to applicant's request to void the OER closing 31 October 1984; however, it is in the interest of justice to excuse the failure to timely file.
3. Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice warranting favorable consideration of a portion of applicant's requests. After reviewing the evidence of record and the applicant's submission, we agree with HQ AFPC/JA and HQ ARPC/DA that at the time the applicant initially separated from active duty, on 1 January 1985, it was possible that he did not receive proper counseling in that he was under the impression that he was transferred to the Inactive Reserve. Therefore, in 1995 when the Air Force Reserve reinstated the applicant to his commission, retroactive to 1 January 1985, the applicant did not understand the repercussions of requesting appointment without the ten-year break in service. The reinstatement retroactive to 1 January 1985 caused him to be considered for promotion to the Reserve grade of major by the FY97 and FY98 Reserve Major Promotion boards and he was not selected by either board. It appears that the second nonselection caused him to be transferred from participating status to the non-affiliated reserve section (NARS) with a mandatory separation date (MSD) of 1 March 1998. We note that the applicant has been relieved from his assignment in NARS and subsequently discharged. Therefore, we believe that the relief sought by the applicant should receive favorable consideration and we recommend the applicant's records be corrected to the extent indicated below.
4. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice with regard to applicant's request to void the Officer Effectiveness Report (OER) for the period closing 31 October 1984. The applicant stated that he did not request an OER at his date of separation (DOS) and that it is substandard because it was written after he submitted his request for separation. However, as stated by HQ AFPC/DPPPA, the contested report was an annual report and it closed out well in advance of his date of separation of 1 January 1985. The applicant has provided no

evidence to substantiate that the OER in question is inaccurate. Therefore, we believe the applicant has failed to sustain his burden that he has suffered either an error or an injustice and we do not recommend that the OER in question be declared void. We also note that at the time the applicant's records were corrected by the Air Reserve Personnel Center (ARPC) to omit a ten-year break in service, he was considered for promotion to the Reserve grade of major by the FY97 and FY98 Reserve major promotion boards. However, since the AFBCMR is now recommending the applicant's records be corrected to reflect a ten-year break in service and voiding the two promotion non-selections, it appears that the applicant will possibly be considered for promotion by the FY2001 Reserve major board. Therefore, he would not be eligible at this time to be considered by a special review board (SRB) for promotion.

THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that:

a. On 2 January 1985, he was not appointed a Reserve of the Air Force.

b. On 12 September 1995, he was tendered and accepted an appointment as a Captain, Reserve of the Air Force, with a promotion service date and promotion effective date of 1 August 1992.

c. He was not considered for promotion to the Reserve grade of major by the Fiscal Years 1997 and 1998 Major Selection Boards.

d. He was not transferred to Headquarters Air Reserve Personnel Center Non-affiliated Reserve Section (NARS/NA), effective 11 September 1997, but on that date, he continued to serve in his assignment [REDACTED]

e. Reserve Order [REDACTED] dated 8 August 1998, be revoked.

f. He was credited with 35 non-paid Inactive Duty Training (IDT) points and 15 membership points during the retirement/retention year 12 September 1997 through 11 September 1998, resulting in 50 total points; and, that the period 12 September 1997 through 11 September 1998 is a year of satisfactory Federal service.

The following members of the Board considered this application in Executive Session on 25 August 1998, under the provisions of AFI 36-2603:

Mrs. Barbara A. Westgate, Panel Chair
Ms. Olga M. Crerar, Member
Ms. Patricia D. Vestal, Member

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

- Exhibit A. DD Form 149, dated 26 Aug 97, w/atch.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, HQ ARPC/DA, dated 19 Mar 98, w/atchs.
- Exhibit D. Letter, HQ AFPC/DPPPA, dated 11 Jun 98.
- Exhibit E. Letter, HQ AFPC/JA, dated 2 Jul 98.
- Exhibit F. Letter, AFBCMR, dated 7 Jul 98.


BARBARA A. WESTGATE
Panel Chair



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR RESERVE PERSONNEL CENTER

19 MAR 1998

MEMORANDUM FOR AFBCMR
1661 Air Force, Pentagon
Washington DC 20330-1661

FROM: HQARPC/DA
6760 E Irvington PI#2000
Denver CO 80280-2000

SUBJECT: Application for Correction of Military Records. [REDACTED]

1. The requested correction cannot be accomplished administratively at this level.
2. The applicant requests correction of his military record to reflect that he had a ten year break in service, from 1 January 1985 through 12 September 1995. The applicant claims omitting the ten year break in service caused his being twice deferred from promotion on the FY97 and FY98 major promotion boards and requests the deferrals to be removed. He also requests, if appropriate, a Special Review Board be convened and the 1984 Officer Effectiveness Report (OER) be removed from his record. The applicant further requests participation points to give him a year of satisfactory service to 11 September 1997 when he was removed from participating status.
3. The following is an analysis of the case:
 - a. The applicant separated from active duty on 1 January 1985 and claims that due to improper counseling was not transferred to the Air Force Reserve.
 - b. The applicant submitted an application to the Air Force Board for Correction of Military Records (AFBCMR 95-01971, dated 21 July 1995) requesting he be appointed as Reserve of the Air Force without a break in service.
 - c. On 12 September 1995, through administrative correction, the applicant was appointed as Reserve of the Air Force without a break in service effective 2 January 1985.
 - d. The applicant was considered but yet not selected for promotion by the FY97 and FY98 major promotion boards.
 - e. Due to the twice deferral from promotion, the applicant was transferred, effective 11 September 1997, from participating status to the non-affiliated reserve

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7. If you have any questions regarding this advisory, please contact [REDACTED]
E-mail [REDACTED] or toll
free [REDACTED] extension [REDACTED]



[REDACTED] Colonel, USAF
Director of Assignments and Readiness

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DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE PERSONNEL CENTER
RANDOLPH AIR FORCE BASE TEXAS

11 JUN 98

MEMORANDUM FOR AFBCMR

FROM: HQ AFPC/DPPPA
550 C Street West, Suite 8
Randolph AFB TX, 78150-4710

SUBJECT: [REDACTED]

This is in response to your subject memorandum in which you request our review and comment regarding the applicant's request to void his 31 Oct 84 officer effectiveness report (OER) and the removal of the two nonselections for promotion to the grade of major by the FY97 and FY98 Reserve promotion boards. Since the promotion boards were Reserve boards conducted while the applicant was not on active duty, we are unable to comment on them. Instead, we believe HQ Air Reserve Personnel Center (HQ ARPC), Officer Promotions, should have the opportunity to comment on this issue. We will discuss the applicant's request to remove the 31 Oct 84 OER only.

First of all, the request to remove the OER is not timely filed. The application may also be dismissed under the equitable doctrine of laches, which denies relief to one who has unreasonably and inexcusably delayed in asserting a claim. Laches consists of two elements: inexcusable delay and prejudice to the Air Force resulting therefrom. In the applicant's case, he has waited 13+ years to file and took no action on the claim before that. The applicant has inexcusably delayed his appeal (providing no explanation) and, as a result, the Air Force no longer has documents on file, memories fade, and this complicates the ability to determine the merits of his position. In addition, the test to be applied is not whether the applicant discovered the error within three years, but whether, through due diligence, it was discoverable (see OpJAGAF 1988/56, 28 Sep 88, and the cases cited therein). Clearly, the alleged error(s) upon which he relies has/have been discoverable since the alleged error(s) occurred. In short, the Air Force asserts that the applicant's unreasonable delay regarding a matter now dating back 13+ years has greatly complicated its ability to determine the merits of the applicant's position.

The contested OER has been a matter of record for 13+ years. The test to be applied is not merely whether the applicant discovered the error within three years, but whether through due diligence, he could or should have discovered the error(s) (see OpJAGAF 1988/56, 28 Sep 88, and the cases cited therein). Clearly, the alleged error(s) upon which he relies has/have been discoverable since publication of the OER in question. Therefore, we see no valid reason to waive the statute of limitations and consider the applicant's requests.

The governing directive is AFR 36-10, Officer Evaluations, 25 Oct 82.

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The applicant contends he did not request an OER at his date of separation (DOS) and that "it is substandard because it was written after he had submitted (his) DOS from active duty." There is no provision in AFR 36-10 for the ratee to request an OER after he or she has applied for separation from active duty. AFR 36-10, Table 4-7, note 3, states, "If the report is required as a result of the separation, retirement, or PCS reassignment of the rater or PCS or separation of the **ratee**, the report is usually closed out **30** calendar days before the rater or ratee's departure date..." In the applicant's case, the contested OER was an annual report, and it closed out well in advance of his date of separation of 1 Jan 85.

The applicant has provided nothing to substantiate the contested OER is inaccurate as written. He just simply states it is substandard. Statements from the evaluators during the contested period are conspicuously absent. In order to successfully challenge the validity of an evaluation report, it is important to hear from the evaluators--not necessarily for support, but at least for clarification/explanation. The applicant has not provided any such documentation. Without benefit of these statements, we can only conclude the OER is accurate as written.

An evaluation report is considered to represent the rating chain's best judgment at the time it is rendered. We contend that once a report is accepted for file, only strong evidence to the contrary warrants correction or removal from **an** individual's record. The burden of proof is on the applicant. He has not substantiated the contested report was not rendered in good faith by all evaluators based on knowledge available at the time.

We strongly recommend this application be time-barred from consideration. The applicant separated from active duty over 13 years ago. If, however, the AFBCMR decides to consider the application on its merits, then we firmly believe the application should be denied due to lack of merit.



Acting Chief, Appeals and SSB Branch
Directorate of Pers Program Mgt





DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE PERSONNEL CENTER
RANDOLPH AIR FORCE BASE TEXAS

2 July 1998

MEMORANDUM FOR AFBCMR

FROM: HQ AFPC/JA [REDACTED]
550 C Street West, Suite 44
Randolph AFB TX 78150-4746

SUBJECT: Application for Correction of Military Records - [REDACTED]

Applicant is before the AFBCMR for the second time. The applicant initially separated from active duty on 1 January 1985 and claimed that because of improper counseling he was not transferred into the Air Force Reserve. In 1995, upon learning he was not a member of the Inactive Reserve, the applicant filed his first application for relief with the AFBCMR seeking "reinstatement" of his commission retroactive to 1 January 1985. In August 1995, HQ ARPC, believing that corrective action could be taken administratively, made the corrections to his record and gave the applicant constructive credit in the Inactive Reserve retroactive to 2 January 1985. The applicant was subsequently considered but not selected for promotion by the FY97 and FY98 Reserve major promotion boards. The second deferral triggered a transfer from participating status to the non-affiliated reserve section (NARS) with an adjusted mandatory separation date (MSD) of 1 March 1998. On 26 August 1997, the applicant filed his second application for relief, now asking the AFBCMR to change his military record back to show the proper "break in service" from 1 January 1985 through 1 September 1995. He also asks to have his status as twice deferred to Major deleted and seeks appropriate adjustments to his MSD and PSD to ensure he meets the proper Major selection Board.

The advisory opinion provided by HQ ARPC/JA in this second case has stated that HQ ARPC/DAO had no authority to make the "administrative correction" referred to above. You have asked for our review of this second application for relief and our comments relating to the conclusions reached by ARPC/JA's advisory opinion in this case. We agree completely with the legal conclusions stated by HQ ARPC/JA. Legally, HQ ARPC/DAO did not have the authority to take it upon themselves to provide the applicant any constructive service credit. The Secretary acting through the AFBCMR has that responsibility as set forth in its Charter (10 U.S.C. 1552). Having lacked the authority to act, we believe the administrative correction (constructive credit retroactive to 1 January 1985) to applicant's record was void and, consequently, any matters arising directly as a result of those void actions would also be a nullity (i.e., the FY96 and FY97 Reserve major promotion board actions deferring the applicant). We do not believe, however, that the applicant's appointment as a Reserve Officer, nor his assignment to a Reserve Unit are void because those actions were independent of and well within

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the authority of HQ ARPC. Having said that, we believe the relief sought by the applicant (with the exception of his request that his 1984 OPR be removed) should be granted and the actions recommended by HQ ARPC/DA, dated 19 March 1998, be taken in this case.


USAF
Staff Judge Advocate



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