

JUN 23 1998

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NO: 98-00166

COUNSEL: NONE

HEARING DESIRED: NO

Applicant requests that his grade at the time of discharge be changed from airman first class (A1C) to senior airman (SRA). Applicant's submission is at Exhibit A.

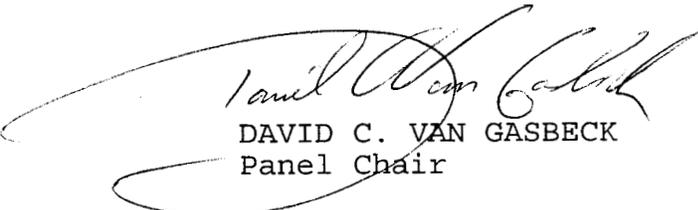
The appropriate Air Force offices evaluated applicant's request and provided advisory opinions to the Board recommending the application be denied (Exhibit C). The advisory opinions were forwarded to the applicant for review and response (Exhibit D). As of this date, no response has been received by this office.

After careful consideration of applicant's request and the available evidence of record, we find insufficient evidence of error or injustice to warrant corrective action. The facts and opinions stated in the advisory opinions appear to be based on the evidence of record and have not been rebutted by applicant. Absent persuasive evidence applicant was denied rights to which entitled, appropriate regulations were not followed, or appropriate standards were not applied, we find no basis to disturb the existing record.

Accordingly, applicant's request is denied.

The Board staff is directed to inform applicant of this decision. Applicant should also be informed that this decision is final and will only be reconsidered upon the presentation of new relevant evidence which was not reasonably available at the time the application was filed.

Members of the Board, Mr. David C. Van Gasbeck, Mr. Michael P. Higgins, and Mr. Thomas S. Markiewicz considered this application on 17 June 1998, in accordance with the provisions of Air Force Instruction 36-2603, and the governing statute, 10 U.S.C. 1552.



DAVID C. VAN GASBECK
Panel Chair

Exhibits:

- A. Applicant's DD Form 149
- B. Available Master Personnel Records
- C. Advisory Opinions
- D. SAF/MIBR Ltr Forwarding Advisory Opinions



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

18 March 1998

MEMORANDUM FOR AFBCMR

FROM: HQ AFPC/JA (Colonel Rooten)
550 C Street West Ste 44
Randolph AFB TX 78150-4746

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

We reviewed this Application for Correction of Military Records and found no errors of law requiring comment. We defer to AFPC/DPPPWB's advisory which indicates applicant never completed the minimum requirements for promotion to Senior Airman, and therefore, his application should be denied. Nevertheless, since the BCMR's consideration of applicant's case must also address his contention of injustice, we thought it might be instructive to review the standard for establishing an injustice.

A fair reading of the legislative history and judicial interpretations of 10 U.S.C. 1552(b) clearly supports an interpretation that relief should be limited to those situations to preclude substantial injustice, rather than to insure precise uniformity of treatment or to favor one side or the other on issues about which differences of opinion might reasonably exist. The United States Claims Court has repeatedly defined an injustice (or "in the interest of justice") as that behavior or an action that rises to a level of shocking the conscience. See *Sawyer v. United States*, 18 Ct.Cl. 800 (1989).

In our opinion, this case is clearly not one which could be characterized as "shocking the conscience." Applicant made a conscious decision to not return to active duty when offered that opportunity, and even now, in his application, he does not ask to return to active duty to fulfill the minimum requirements for promotion.

A handwritten signature in black ink, appearing to read "Willard K. Lockwood".

WILLARDK. LOCKWOOD
Senior Attorney-Advisor



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

7 FEB 1998

MEMORANDUM FOR AFBCMR

FROM: AFPC/DPPPWB
550 C Street West, Ste 09
Randolph AFB TX 78150-4711

SUBJECT: Application for Correction of Military Records [REDACTED]

Requested Action. The applicant is requesting his grade at the time of discharge from the Air Force be changed to reflect senior **airman** (SRA) (E-4) and not airman first class (A1C) (E-3).

Reason for Request. The Applicant believes that he should have been promoted to the grade of senior airman on 10 May 92 because his **court** martial conviction was set aside.

Facts. The applicant's records reflect that he was discharged in the grade of airman first class on 25 Mar 96.

Discussion.

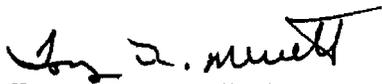
a. Basic eligibility criteria for promotion to SRA is 36 months total active federal military service (TAFMS) and 20 months time-in-grade (TG) (both requirements must be met) as an A1C or 28 months **TIG** as an A1C, without regard to TAFMS. The member will be promoted on the date either of these parameters is satisfied, which in his case would have been 10 May 92. However, in addition to the TIG and TIS requirements, the member must not be ineligible in accordance with AFI 36-2502, Tables 1.1 and 1.2, have a 5-skill level primary Air Force Specialty Code (AFSC) and all promotions must be approved by the commander.

b. A review of the applicant's records reflects the following scenario. Applicant tested positive for cocaine in a random urinalysis Aug 91 and placed in Substance Abuse Reorientation and Treatment (SART) program. On 18 May 92 he requested a discharge in lieu of **trial** by court martial and it was denied on 10 Jun 92. General Court Martial Order # 82 on 17 Jul 92 found him guilty and his sentence adjudged on 12 Jun 92. The punishment consisted of a bad conduct discharge, confinement for 30 days (served 15 Jun 92 thru 8 Jul 92) and forfeiture of \$500.00 pay for one month, and reduction to **airman** basic. Applicant was put on appellate review leave starting 22 Jul 92 and on 25 Aug 95 the court martial was set aside per General Court Martial Order # 7 dated 29 Nov 95 and the charge and specification were dismissed. Applicant was directed to return to active duty no later than 15 Dec 95 and he requested and was granted an extension. The applicant declined the opportunity to be recalled to active duty and requested that

he be separated with an honorable discharge. He was discharged on **26 Mar 96** in the grade of A1C.

c. Although the applicant met the **20** months time-in-grade requirement for promotion to SRA on 10 May **92**, he did not possess the required 5-skill level primary Air Force Specialty Code (AFSC). Also, we are unable to determine at this time if the applicant would have been recommended for promotion based on the circumstances during this time frame, even **if** he had held the mandatory 5-skill level PAFSC. Also, the computer generated rip (Report on Individual Person) dated **29 Dec 95** reflects promotion eligible status code as **O**, which identifies a member who failed SART track **3, 4**, or entered SART track **5**, which renders individual ineligible for promotion as outlined in AFR **39-29** Table **2** Rule U. For these reasons **we** do not support the applicant's promotion to SRA. If the board disagrees it could promote him 10 May **92**, assuming it waived the required 5-level PAFSC. The applicant claims that he would have been promoted to SRA on 10 May **92** and would have tested for SSgt one year later. Based on a DOR to SRA of 10 May **92**, he would have met the time-in-grade requirement for SSgt for the 94A5 cycle (promotion effective Sep **93** - Aug **94**) with promotion testing during Apr - Jun **93**. Again, there is no certainty he would have been selected for promotion to SSgt even if he was otherwise eligible for consideration, to include the recommendation of his commander. In addition to meeting all basic eligibility requirements, a member must also take the required Promotion Fitness Examination (PFE) and Specialty Knowledge Test (SKT). Without these tests an individual cannot be considered for promotion to SSgt.

- . Recommendation. Denial of the applicant's request based on the rationale provided.


TONY R. MERRITT
Chief, Inquiries/BCMR Section
Airman Promotion Branch

Attachment:
Extract cy, AFR **39-29**

TABLE 2

DETERMINING INELIGIBILITY FOR PROMOTION (see note 1)		RULE			
If on or after the promotion eligibility cutoff date, and the airman is		1	2	3	4
A	serving in grade MSgt or SMSgt	Yes			
B	serving in grade SrA through TSgt		Yes		
C	to be promoted to grade Amn through SrA			Yes	
D	to be promoted to grade SSgt through MSgt under STEP				Yes
then the airman is ineligible for promotion during a particular cycle when he or she					
E	has a mandatory date of separation (DOS) (high-year tenure) or has 30 or more years' service with a DOS before the first day of the month promotions are generally made in the cycle; or has a projected retirement to be effective before the first day of the month promotions are generally made in the cycle (see note 2)	X	X		
F	is a career airman who declines to extend or reenlist to obtain service retainability for completing a controlled duty assignment, PCS, TDY, and retraining; or declines retraining according to AFR 39-4; or is an airman who has an approved voluntary retirement instead of an assignment. PES code C (see note 2)	X	X	X	X
G	has been convicted by court-martial, or is undergoing punishment or suspended punishment imposed by court-martial. This includes completed punishment and cases where sentence does not include punishment. PES code F (see note 2)	X	X	X	X
H	is on the airman control roster (AFR 35-32). PES code G (see note 3)	X	X	X	X
I	is serving a probationary period under AFR 39-10. PES code K	X	X	X	X
J	is decided by the Secretary of the Air Force to be unfit to perform the duties of the grade because of physical disability. When an airman on a selected list has been referred to a PEB and the board action has not yet been finalized, 5 duty days before the airman's effective date of promotion, the servicing CBPO queries HQ AFMPC/DPMAJW1 for a decision as to whether the airman should be promoted. PES code L (see note 4)	X	X	X	X
K	refuses at the time he or she is scheduled to complete one or more proper tests, and has an AF Form 1566 on file to that effect. PES code M	X	X		X
L	is not recommended for promotion consideration, or the promotion authority removes him or her from a select list. PES code N (see note 5)	X	X	X	X
M	fails to appear for scheduled testing without a valid reason as decided by immediate commander PES code P. (see paragraph 11B.)	X	X		
N	is absent without leave (AWOL) or in deserter status. PES code U	X	X	X	X
O	(excluding minor traffic violations) has been convicted by a civilian court or is undergoing punishment, suspended punishment, suspended sentence, probation, work release program, or any combination of these or similar court-ordered conditions to include the period of time the airman is on probation after serving part of a sentence or has had the sentence withheld for a period of time. The ineligibility period will equal the maximum confinement for the same or most closely related offense under the Manual for Courts-Martial. PES code W. (see note 6.)	X	X	X	X
P	applies for voluntary retirement after promotion selection notification, and as a result of the approved retirement, does not have sufficient retainability to satisfy the required service commitment. Grade-status-reason is 3C. No change in PES code	X			X
Q	has an approved application for separation as a conscientious objector, or is being processed for involuntary separation under AFR 39-10. PES code V	X	X	X	X
R	is on the select list and declines promotion, or is a MSgt, SMSgt, or CMSgt selectee and has failed to acquire service retainability required by paragraph 15. Grade-status-reason is 3D. No change in PES code	X	X		X
S	has NCO status denied or vacated, or has been denied or not selected for reenlistment, PES code J	X	X	X	X
T	is undergoing administrative demotion action under AFR 39-30. PES code H	X	X	X	X

* Individuals with MYT DATE of MAR (MSGT) and JUL (SSGT and TSgt) who extend for RETMT to be eff 1 APR or 1 Aug are eligible for promotion consideration, and if selected may withdraw RETMT

If on or after the promotion eligibility cutoff date, and the airman is		RULE			
		1	2	3	4
U	is identified as a substantiated substance abuser far other than alcohol who has not successfully completed rehabilitation under the USAF SART Program. PES code T	X	X	X	X
V	is disqualified for cause from a previously held AFS. PES code Q	X	X	X	X
*W	is undergoing a suspended reduction imposed by UCMJ, Article 15. PES code A (See Note 7.)	X	X	X	X

NOTES

1. For ineligibility of airmen entering commissioning programs, see paragraph
2. Airmen will not receive supplemental promotion consideration for any cycle in which they were ineligible under this rule. The PES code will be changed to "X" effective the date the specific ineligibility condition ends; for example, the date AFMPC approves the withdrawal of a PCS declination statement.
3. Airmen serving in the grade of AB through A1C may be promoted the day following completion of punishment or removal from the control roster, if the commander recommends it and the airman is otherwise eligible (see paragraphs 13 and 14). For airman in grades SrA/Sgt through SMSgt, see paragraph 5.
4. An airman who remains on active duty in a limited assignment status (LAS), or who remains on active duty and is later found ~~it~~ after formal proceedings is promoted on the

promotion effective date on which the seniority sequence number is announced.

5. Airmen in the grade of AB, Amn, or A1C are nonrecommended in monthly increments from the original effective date under AFM 30-130, volume I, chapter 15. BTZ selectees who are later removed from the selection list remain ineligible until they meet their fully qualified promotion criteria.

6. Waiver of the promotion ineligibility or any portion of the ineligible period is authorized, No waiver is authorized if the airman is convicted and sentenced to confinement. The waiver authority rests with the MAJCOM/DP/MP and is not delegated lower than the base commander.

*7. Effective 1 August 1990, Any Article 15, suspended reduction rendered prior to 1 August 1990 remains under the provisions of paragraph 27.

TABLE 3	
WITHHOLDING PROMOTION	
I T E M	An airman's promotion is withheld when his or her name is not removed from a selected or eligibility list and the airman is
1	awaiting a decision on an application as a conscientious objector (AFR 35-24). PES code S.
2	placed into the SART Program for alcohol abuse. PES code E (see notes 1 and 2).
3	in the Weicht Management Program (WMP), Phase I (codes 1, 2.5, or 6). PES code I (see notes 1 and 3).
4	under court-martial or civil charges. PES code D (see note 4).
5	pending data verification and the record is not available. GSR code 2D.
6	missing a source document, and the CBPO cannot verify one or more promotion factors. GSR code 2R.
7	under other reasons as the commander requests with prior approval from the individuals MAJCOM (see note 5).
8	identified as having 18 or more years' TAFMS as of the promotion effective date and does not have 2 years' retainability as of the day before the promotion effective date.
*9	serving in the grade of SrA and has not completed the noncommissioned officer preparatory course or the airmen leadership school; serving in the grade of TSgt and has not completed the command NCO academy or SMSgt and has not completed the senior NCO academy (or equivalency) in residence (see note 6).

NOTE(S):

1. Individuals may be promoted on successful completion of the SART program for alcohol abuse or when the WMP or Fitness Program standards are met. Withholding the promotion is not mandatory for individuals who identify themselves for treatment in the SART program for alcohol abuse according to AFR 30-2.
2. The unit commander has the authority to waive promotion eligibility restrictions for those individuals entered into aftercare. Commanders should consider recommendations of the intervention committee members, but the promotion authority retains final decision.
3. An individual may be submitted for an exception to policy when placed into WMP code 5 if the promotion authority decides it is appropriate.
4. A commander may withhold an airman's promotion if

the airman is under investigation or is a subject of an inquiry (formal or informal) that military authorities or civil law enforcement authorities are conducting that may result in action under WCMJ or prosecution by civil authorities. The commander may also withhold the promotion if the investigation or inquiry has been completed but no determination has been made as to the action the military or civil authorities will take. PES code B.

5. The MAJCOM DP or MP may, delegate approval authority no lower than the wing commander.

*6. Waiver authority for noncompletion of the in-resident PME courses for promotion, to the grades of SSgt, MSgt and CMSgt rests with the AF/DP.

TABLE 6						
MINIMUM ELIGIBILITY REQUIREMENTS FOR PROMOTION (see note 1)						
R U L E	A	B	C	D	E	F
	If the promotion is to the grade of	and the PAFSC as of the cutoff date is at the	and the time in current grade computed as of the first day of the month before the month in which promotions normally are made in the cycle is	and the TAFMS as of the first day of the last month of the promotion cycle is (see note 2)	and	then
1	SrA	5-skill level or 3-skill level when no 6 level exists in the AFSC (see note 3).	not applicable (see paragraph 13 for requirements)	1 year (see paragraph 13 for other TIS or TIC requirements)		the airman is eligible for promotion provided he or she is recommended, in writing, by the promotion authority, was serving on active duty in enlisted status as of the PECD, and has served in continuous active duty until the effective date of promotion and is not placed into a condition listed under table 2 on or after the PECD. Member must be in PES • code X on the effective date of promotion (see note 4).
2	Sgt (see note 5)		6 months	3 years		
3	TSgt (see note 5)	7 level	13 months	5 years		
4	MSgt (see note 5)		4 months	3 years		
5	SMSgt	7 or 9 level	0 months	11 years	has 3 years' cumulative enlisted service (TEMSD) creditable for basic pay (see note 6)	