

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

IN THE MATTER OF:

DOCKET NUMBER: 92-00263

COUNSEL: NONE

AUG 6 1998

HEARING DESIRED: YES

APPLICANT REQUESTS THAT;

A reaccomplished Promotion Recommendation Form (PRF), with a Definitely Promote (DP) recommendation, be placed in his Selection Folder, and his corrected record be considered by a Special Selection Board (SSB) for promotion by the CY90 central lieutenant colonel selection board.

By amendment, dated 2 December 1995, applicant requests that:

His nonselections for promotion to lieutenant colonel, beginning with the CY90 lieutenant colonel board, be declared null and void.

The reaccomplished PRF submitted with his initial submission, prepared for the CY90 lieutenant colonel board, be upgraded to reflect a Definitely Promote recommendation.

His record be corrected to reflect selection for promotion (in the promotion zone) to the grade of lieutenant colonel by the CY90 lieutenant colonel board.

His record be corrected to reflect continuous active duty since his illegal separation, which was based on nonselection for promotion, to include restoration of all pay, benefits, and any other entitlements to include carryover of the maximum amount of leave for the period he was not on active duty.

APPLICANT CONTENDS THAT;

Since filing his initial appeal, he has learned that illegal mini-boards were used within his major command (MAJCOM) to determine which officers would receive a "Definitely Promote" recommendation.

Although the initial review of his MAJCOM Officer Evaluation System (OES) procedures did not include his in-the-promotion-zone (IPZ) consideration, he contacted his former senior rater who confirmed that mini-boards were used to make the promotion recommendations. In fact, this confirms how his senior rater's lack of knowledge of

his (applicant's) performance during the initial cycle precluded him from competing for a DP as the mini-boards made this decision.

His senior rater has confirmed mini-boards were used at the 1990 lieutenant colonel PRF cycle, and had it not been for these mini-boards he would have received a DP recommendation.

The selection boards which considered his file were held in violation of statute and DOD Directive. Each violation of statute and directive involved a specific provision designed to afford him a certain element of 'protection' by requiring specific procedures to ensure selection boards operate fairly. In his case, the majority consensus of his jury (board members) was never developed, his jury members (board members) were never told of findings and his jury (board members) were never shown the product of their labors (the recommended list). This deliberate systemic violation of his basic rights as guaranteed by statute and directive cries aloud for relief. Therefore, request the AFBCMR set aside the nonselections he received at the selection boards which considered his file for promotion.

The evidence provided again proves direct promotion is within the Board's authority and that SSBs cannot provide a full, let alone fitting measure of relief.

In support of his request, applicant provided his 13-page statement; a memorandum addressed to another officer from the Director of Personnel at the Air Intelligence Agency regarding review of the promotion recommendation process; a statement from the senior rater of the PRF prepared for the CY90A lieutenant colonel selection board; a copy of the reaccomplished PRF provided with his initial submission, which reflects a "Promote" recommendation; and a document entitled "Illegal Air Force Selection Boards: Documentary Summary." Applicant also provided a statement from the Management Level Evaluation Board (MLEB) president for the 1990 lieutenant colonel promotion recommendation cycle. (Exhibit F)

EXAMINER'S NOTE: With respect to applicant's attachment regarding the illegal selection boards, I have only attached tabs 9 and 10. Tabs 1 through 8 are identical to the ones included in the same document provided with the case pertaining to Peter Lamaire.

STATEMENT OF FACTS:

On 23 July 1992, the AFBCMR considered and denied an application submitted by applicant requesting that a reaccomplished PRF, with a Definitely Promote (DP) recommendation, be placed in his Selection Folder, and his corrected record be considered by an SSB for promotion by the CY90 central lieutenant colonel selection board. (Exhibits A through E).

Pertinent facts pertaining to applicant's service history are contained in the Statement of Facts section of the original Record of Proceedings.

Applicant was considered but not selected for promotion to the grade of lieutenant colonel by the CY90, CY91A, CY91B, and CY92 central lieutenant colonel selection boards, which convened on 16 January 1990, 15 April 1991, 2 December 1991, and 16 November 1992, respectively. Based on his status as an officer in sanctuary, he was continued on active duty and had an established date of separation of 31 October 1993.

Information extracted from the Personnel Data System (PDS) reflects that the applicant was relieved from active duty on 31 October 1993 and retired effective 1 November 1993. At that time, he was credited with 20 years and 5 days of active Federal service.

AIR FORCE EVALUATION:

The Appeals and SSB Branch, AFPC/DPPPA, reviewed this application and recommended denial. Their comments, in part, follow.

DPPPA stated applicant's request that his record be corrected to reflect continuous service since his "illegal separation" is unfounded. The applicant received full retirement from the Air Force. It is extremely rare for the Air Force to separate officers in the grade of major and above. In the absence of impropriety, only majors who choose to separate do so without receiving, at least, early retirement benefits.

Regarding the most recent letters of support from the senior rater and MLEB president, DPPPA is not convinced by their statements. In the letters provided by these individuals accompanying the applicant's initial application, both stated new information regarding the applicant's duty history warranted a new PRF. Neither the senior rater nor the MLEB president prove they were unaware of the information at the time the PRF was written. Furthermore, neither stated how this new information actually changed the applicant's promotion potential. In the most recent letter, written after the senior rater and MLEB president retired, both state there were "mini-boards" used in assigning DPs during the period of the contested PRF. These statements are contradictory at the very least, and are more likely indicative of integrity issues regarding the senior rater and MLEB president. DPPPA questions which scenario is to be used in assessing the validity of the applicant's case, the missing information claim, or the "mini-board" claim? No evidence has been provided that might even suggest the existence of error or injustice in the writing and evaluating of the applicant's PRF. They have been provided no reason to believe the report was not a valid assessment of the applicant's promotion potential at the time it was written. The applicant had been on station with the senior rater for over a year

when the PRF was written, and DPPPA has no reason to believe the senior rater was not fully aware of the applicant's achievements. The "mini-boards'" claim is no more than a vague admission of impropriety, made after retirement, that is unsubstantiated by necessary Inspector General (IG) corroboration. DPPPA strongly recommended denial of the applicant's request for a replacement PRF and corresponding SSB consideration.

Regarding applicant's request for direct promotion, DPPPA did not believe it would be the corresponding remedy to the applicant's claims. If the applicant were to prove the PRF system or promotion system to be in error (and they do not believe they are), the remedy would not be the promotion of the applicant. It is illogical to assume this requested action has anything to do with the legality of the entire promotion system. The applicant has compiled an exhaustive appeal history, with each case stating different reasons for the applicant's belief that he was treated unfairly by the promotion system. DPPPA has been given no reason to believe the applicant is making an attempt to correct an error or injustice, but that he is attempting to retroactively change his promotion history. The complete evaluation is at Exhibit G.

The Staff Judge Advocate, AFPC/JA, opined that the application should be denied, stating the applicant has failed to present relevant evidence of any error or injustice warranting relief. The JA comments, in part, follow.

JA stated that although the applicant styled the first part of his 2 December 1995 brief "Ground for Relief: Illegal Promotion Recommendation Process," he did not allege any systematic illegality with the Air Force's promotion recommendation process. Rather, he alleged that his particular rating chain violated the governing regulation by using prohibited "mini-boards" and considering prohibited subjects in awarding PRFs. On that issue, JA deferred to, and concurred with, the evaluation provided by AFPC/DPPPA.

Noting applicant's contentions that the promotion selections boards in the Air Force are contrary to Air Force regulation, DOD Directives and statute, JA stated there is no provision of law specifically requiring each member of a promotion board to personally review and score the record of each officer being considered by the board. The House Armed Services Committee Report (97-141) that accompanied the Defense Officer Personnel Management Act (DOPMA) Technical Corrections Act (PL 97-22) specifically references panels as a type of administrative subdivision of selection boards. Consequently, it is clear that at the time DOPMA was enacted, Congress was certainly aware of the existence of promotion board panels and expressed no problem with their use. Furthermore, the language of 10 USC 616(a) and (c) (the recommendation for promotion of officers by selection boards, not just 617(a) (the certification by a majority of the members of the board), speaks to the corporate board and not to individual members. In essence, a majority of the board must recommend an

officer for promotion and each member is required to certify that the corporate board has considered each record, and that the board members, in their opinion, have recommended those officers who "are best qualified for promotion." The members are not required to reach this point through an individual examination of every record, although they may do so. Rather, based on their overall participation in the board's deliberations, and the fact that the process involves the random assignment of officer selection records to panels to achieve relatively equal quality and procedures to insure that the quality of the records of those officers recommended for selection among the panels is essentially identical, the members are in a position to honestly certify that the process in which they participated properly identified, based on the record before them, those officers who were best qualified for promotion. In JA's opinion, that is enough to assure compliance with all the statutory requirements.

Applicant argues that the Air Force promotion board was illegal because the Air Force convened a single board consisting of panels rather than convening separate boards as required by the DOD Directive. JA opined this argument is without merit. It is clear that the directive's purpose in requiring separate boards for each competitive category is to insure that these officers compete only against others in the same competitive category - to assure fairness and compliance with Title 10, Chapter 36 (particularly Section 621 requirements). In truth, nomenclature notwithstanding, the Air Force's competitive category panels, which are convened concurrently as permitted by the Directive, fully accomplish this stated purpose; i.e., members of each competitive category compete within their respective panel only against other officers of that same category. Thus, the panels operate as separate boards for purposes of the DOD Directive. More importantly, they fulfill all the requisite statutory and regulatory requirements.

JA disagreed with applicant's argument that the board president's duties in the Air Force process violates DOD Directive 1320.12, Section F, para 2(a)(1). The duties prescribed for board presidents by Air Force directives do require the president to perform several critical duties relative to board scoring. Those duties do not, however, in any manner, constrain the board from recommending for promotion the best qualified among the fully qualified officers being considered. Applicant has offered no proof that the president of this or any Air Force selection board has ever acted contrary to law or regulation. In the absence of evidence to the contrary, the board president and other members of the board are entitled to the presumption that they carried out their duties and responsibilities properly and according to law.

Applicant cites case law to support the proposition that he is entitled to "full and fitting relief." He then suggests that in the context of this case such relief would equate to a direct promotion. Even if one were to agree with his specious arguments challenging the Air Force selection board process, it does not follow that the remedy for such behavior would-or should-include

this applicant's promotion. Indeed, applicant has failed to present any evidence whatsoever that the systematic errors he alleges were responsible for his promotion nonselection. The law is clear that in order to obtain relief, the officer must prove a nexus (causal connection) between the alleged error and the promotion passover.

Noting applicant's claims that his nonselection cannot be remedied by SSB consideration, JA opined that the Air Force's SSB procedure fully comports with the 10 USC 628(a)(2) requirement that an officer's "record be compared with a sampling of the records of those officers of the same competitive category who were recommended for promotion, and those officers who were not recommended for promotion, by the board that should have considered him." The burden is on the applicant to prove otherwise, and he has failed to do so.

As to the request for direct promotion, both Congress and DOD have made clear their intent that errors ultimately affecting promotion should be resolved through the use of special selection boards. Air Force policy mirrors that of 10 USC 628(b) and DOD Directive 1320.11, para D.1. Moreover, JA has repeatedly agreed with AF/JAG (OpJAGAF 1994/17) that the AFBCMR is not in the appropriate position to grant a direct promotion-that in promotion matters, the Board's authority should be limited to correcting military records which may have affected the promotion process, and recommending SSB consideration in appropriate cases. The United States Court of Federal Claims concurs in this, *Finkelstein v. United States*, 29 Fed.Cl.611 (1993). Otherwise, the BCMR-which is not comprised in accordance with 10 USC 612 and has no basis for comparing an applicant's record with those of his competitors-would be essentially usurping the statutory power of promotion boards. At a minimum, it is safe to say that the BCMR has not in the past (and likely will not in the future) considered direct promotion except in the most extraordinary circumstances where SSB consideration was deemed totally unworkable. The applicant's case clearly does not fall into that category.

Finally, even if JA were to assume arguendo, that applicant had established an error that an SSB could not remedy (a notion they firmly reject), it is quite another matter to directly promote him. That would presuppose that applicant was indeed one of those best qualified to be promoted. Applicant competed at the CY90 and later promotion boards with a "promote" recommendation and if, indeed, his record were truly deserving, he could have-and would have-been selected for promotion.

The complete evaluation is at Exhibit H.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Applicant stated that while AFPC attempts to undermine the integrity of his evaluators, they provide nothing to overcome the statements from those evaluators.

The requirements of AFR 36-10 are clear; the use of mini-boards is prohibited in the PRF process. While AFPC would like the AFBCMR to ignore these rules, his senior rater and MLEB president confirmed the same mini-board process was used in 1990 just as his MAJCOM IG confirmed these illegal actions occurred on the 1991 (and later) lieutenant colonel PRF cycles. The evidence also confirms that had these processes not been used, he would have received a "Definitely Promote" recommendation. He, therefore, asks the Board to upgrade the promotion recommendations he received to reflect "Definitely Promote" as recommended by his former senior rater and MLEB president.

In his petition he documented specific violations of statute and directive which go to the very heart of the due process requirements imposed on selection boards by statute and DOD Directive. The evidence is not just clear but convincing as well - particularly as AFPC has not rebutted a single ground for relief. He has provided not only evidence of probable error, but a preponderance of evidence showing the Air Force selection board process was operated totally outside the law when the boards met that considered his file for promotion. Any of these violations of law and directive would singularly dictate set aside of the liability he incurred as a result of these illegal boards. Collectively, these violations mandate such action by the board to provide him "full and fitting relief."

In view of the deliberate violation of DOD Directive 1320.12 requirements, applicant's requests the Board to direct his promotion to the grade of lieutenant colonel as if selected by the CY90 lieutenant colonel board. In view of the total disregard by Air Force officials for higher level directive and the law, only the AFBCMR can intervene and grant full and fitting relief and grant promotion to lieutenant colonel.

Applicant's response, with attachments, is at Exhibit J.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After reviewing the evidence of record, we are not persuaded that the

contested PRF was rendered in error or is unjust. Applicant's contentions are duly noted; however, in our opinion, the detailed comments provided by the appropriate Air Force office more than adequately addresses his contentions. In addition, applicant's allegations concerning the Air Force's promotion system are noted. Again, we find the applicant's assertions, in and by themselves, are not sufficiently persuasive to override the rationale provided by the Staff Judge Advocate. Therefore, we agree with the recommendations of the Air Force 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 injustice. In view of the above findings, we find no basis upon which to recommend favorable consideration of his requests.

4. 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 15 December 1997, under the provisions of AFI 36-2603:

Mr. Charles E. Bennett, Panel Chair
Mr. John L. Robuck, Member
Mr. Gregory H. Petkoff, Member

The following documentary evidence was considered:

Exhibit F. DD Form 149, dated 2 Dec 95.
Exhibit G. Letter, AFPC/DPPPA, dated 8 Mar 96.
Exhibit H. Letter, AFPC/JA, dated 15 Apr 96.
Exhibit I. Letter, AFBCMR, dated 22 Apr 96.
Exhibit J. Applicant's Response, dated 3 Jun 96, w/atchs.



CHARLES E. BENNETT
Panel Chair