



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

Office of the Assistant Secretary

AFBCMR 95-00486

FEB 19 1998

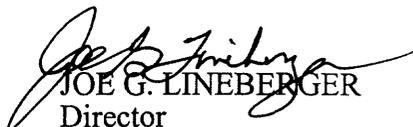
MEMORANDUM FOR THE CHIEF OF STAFF

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. The Company Grade Officer Performance Reports, AF Forms 707B, rendered for the periods 10 May 1989 through 9 May 1990, 10 May 1990 through 9 May 1991 and 10 May 1991 through 9 May 1992, be, and hereby are, declared void and removed from his records and the attached reaccomplished Officer Performance Reports (OPRs) be accepted for file in their place.
- b. The closeout dates on the reaccomplished OPRs be changed from 10 May 1990 to 9 May 1990 and from 10 May 1991 to 9 May 1991.
- c. The comments contained in Section III, Job Description, of the Promotion Recommendation (PRF), AF Form 709, prepared for consideration by the Calendar Year 1993B Major Board, which convened on 6 December 1993, be deleted from that document and the comments contained in Section III of the attached reaccomplished PRF be substituted in their place.

It is further directed that he be considered for promotion to the grade of major by Special Selection Boards (SSBs) for the Calendar Year 1993B and Calendar Year 1994A Central Major Selection Boards, with inclusion of the reaccomplished OPRs and the corrected PRF, and, if he is selected for promotion to the grade of major, the results of the particular Special Selection Board be made available to the Air Force Board for Correction of Military Records at the earliest practicable date so that all necessary and appropriate actions may be taken consistent with his selection for retroactive promotion.


JOE G. LINEBERGER
Director
Air Force Review Boards Agency

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 95-00486

COUNSEL: NONE

HEARING DESIRED: YES FEB 19 1998,

APPLICANT REQUESTS THAT:

1. His Officer Performance Reports (OPRs), closing 9 May 1990, 9 May 1991 and 9 May 1992, be replaced with the reaccomplished OPRs provided.
2. His Promotion Recommendation Form (PRF) for the CY93B (6 December 1993) Major Board be upgraded to "Definitely Promote" with the reaccomplished PRF provided.
3. His nonselections for promotion to major by the CY93B (6 December 1993) and CY94A (22 August 1994) Central Major Boards be set aside.
4. His records be corrected to show he was promoted to the grade of major as if selected in-the-promotion zone (IPZ) by the CY93B (6 December 1993) Major Board, to include award of back dated date of rank, back pay and any and all entitlements denied as a result of promotion nonselection.

APPLICANT CONTENDS THAT:

The contested OPRs were written without the benefit of performance feedback from his supervisors. His supervisors did not have full knowledge of his day-to-day activities.

As a result of errors in his record of performance, the PRF he received for the CY93B Major Board was inaccurate. The contested PRF contains an erroneous duty title, and the comments and overall recommendation do not reflect his true performance based potential.

There were illegal Management Level Evaluation Board (MLEB) procedures in his PRF process.

The promotion boards which considered his record for promotion were held in violation of statute, DOD Directive and Air Force Regulation.

In support of his request, applicant submits a personal statement, with attachments, which include the reaccomplished

OPRs, statements from the rating chain of the contested reports, a Congressional Inquiry and additional documents associated with the issues cited in his contentions (Exhibit A).

STATEMENT OF FACTS:

The applicant's Total Active Federal Military Service Date (TAFMSD) is 18 July 1978.

On 26 August 1982, the applicant was appointed a second lieutenant, Reserve of the Air Force. He was integrated into the Regular Air Force on 10 April 1989 and was progressively promoted to the grade of captain, effective and with a date of rank of 26 August 1986.

The following is a resume of applicant's OPR ratings subsequent to his promotion to the grade of captain:

	<u>Period Ending</u>	<u>Evaluation</u>
	9 May 87	1-1-1
	9 May 88	1-1-1
	9 May 89	Meets Standards (MS)
*	9 May 90	MS
*	9 May 91	MS
*	9 May 92	MS
#	9 May 93	MS
##	9 May 94	MS

* Contested OPRs

Top report at the time he was considered and nonselected for promotion to Major by the CY93B (P0493B) Central Major Board, which convened on 6 December 1993.

Top report at the time he was considered and nonselected for promotion to major by the CY94A (P0494A) Central Major Board, which convened on 22 August 1994.

On 30 April 1995, the applicant was relieved from active duty and retired effective 1 May 1995 in the grade of captain, under the provisions of AFI 36-3203 (voluntary retirement for years of service established by law). He served a total of 16 years, 9 months and 13 days of active service for retirement.

AIR FORCE EVALUATION:

The Chief, Evaluation Procedures Section, HQ AFMPC/DPMAJEP, reviewed this application and stated that, in accordance with the governing regulation, a rater's failure to conduct a required or requested feedback session will not, of itself, invalidate any subsequent OPR or PRF. DPMAJEP indicated that even though the

applicant alleges he requested feedback and did not receive it, no evidence has been presented to reflect he elevated this issue through his rating chain until it was resolved. DPMAJEP finds no violation of regulatory provisions that would result in the OPRs being flawed. The OPRs in question are considered an accurate assessment of the applicant's performance when they become a matter of record. DPMAJEP therefore recommended the applicant's request be denied (Exhibit C).

The Chief, Evaluation Boards Section, HQ AFMPC/DPMAJEB, reviewed this application and indicated that they will only address the technical aspects of this case. DPMAJEB stated that there is no information provided in this case that specifically relates to errors or inaccuracies in the Promotion Recommendation Form (PRF), other than a statement by the member. DPMAJEB stated that although the applicant contends the PRF is defective, he provided no specific information regarding his claim other than his OPRs were not accurate. DPMAJEB finds no evidence to support the allegation since the original PRF was not included in the case. With regard to allegations of MLEB improprieties, DPMAJEB stated that no information is provided to substantiate this claim. DPMAJEB indicated that the applicant has concluded that because officers who receive "DP" recommendations by senior raters or MLEBs are promoted near 100% of the time, then the process is illegal because the promotion selection board is not making the decision. DPMAJEB stated that some management levels employ a technique not addressed in AFR 36-10 in which they use comments such as "my top promote," and "if I had one more "DP" he'd get it," and other comments intended to convey to the central selection board how they rank-ordered their officers. DPMAJEB indicated that this is not in violation of Air Force directive.

DPMAJEB stated that the PRF in question is considered an accurate and objective assessment of the applicant's performance at the time it was rendered. DPMAJEB indicated that the documentation presented in the form of reaccomplished OPRs does not dispute the fact that this report was an accurate assessment when rendered, and the changes being requested are post-rating assessment following nonselection by the promotion board. DPMAJEB stated that if the applicant is successful in his appeal to have the contested OPRs replaced, they recommend that he solicit a new PRF from the same senior rater who accomplished the original one and this PRF be forwarded to the MLEB president for review. DPMAJEB stated that there is no evidence the applicant did not receive anything but fair and equitable treatment in the PRF and MLEB process.

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

The Chief, Selection Board Secretariat, HQ AFMPC/DPMAJEB, reviewed this application and stated that the applicant argues that the board administratively violated 10 U.S.C., Chapter 616, by using a panel to score records. He alleges that "a majority of the members of the board are never queried to develop the consensus

required by statute." DPMAB indicated that the Air Force has organized central selection boards into panels for many years and the procedure has been reviewed again by HQ USAF/JAG as late as February 1992, and AFMPC/JA in May 1994. The panel concept has safeguards to ensure an equal distribution of the quality spectrum of records to each panel. When more than one panel scores a given competitive category, all the eligible records are aligned in reverse social security number sequence and then distributed in groups of 20 records to each panel. As each panel scores its share of records, an order of merit (OOM) is formed. One of the major responsibilities of the board president is to review the orders of merit to ensure consistency of scoring on each panel and consistency of quality among panels.

DPMAB stated that the applicant also challenges the scoring system used by central selection boards and offers his opinions and interpretations. DPMAB does not agree with those comments. The scoring scale, from 6 to 10 in half point increments, has been used successfully for many years. To ensure its success, a split resolution process is used. A split occurs when two or more panel members assign record scores that are greater than a point and a half different. When this occurs, the record is brought back to the panel to resolve the difference of opinion. This process ensures that one or two officers on a given panel do not have a disproportionate amount of influence over any particular record.

DPMAB indicated that the applicant alleges the selection board report violated 10 U.S.C., Chapter 617. DPMAB stated that as previously referenced, in February 1992, the USAF/JAG reviewed both 10 U.S.C., Section 616, and 10 U.S.C., Section 617, and determined that their selection board procedures comply with the applicable provisions of statute and policy.

With regard to the applicant's allegation that the board which considered him for promotion was illegal because separate boards were not held for each competitive category. DPMAB stated that he is wrong. DODD 1320.12 clearly states "Selection boards convened for different competitive categories or grades may be convened concurrently," and "When more than one selection board is convened to recommend officers in different competitive categories or grades for promotion, the written reports of the promotion selection boards under 10 U.S.C. 617 may be consolidated into a single package for submission as prescribed under 10 U.S.C. 618."

As to the applicant's opinions and interpretations on the responsibilities of the board president, DPMAB disagrees with the applicant's comments. DPMAB stated that the board presidents for the CY93 and CY94 Central Major Selection Boards performed their duties in accordance with the responsibilities of the board president addressed in AFR 36-89 and the Memorandum of Instructions to the board from the Secretary of the Air Force.

With regard to the applicant's statement that the Special Selection Board (SSB) process is illegal since the original central boards are illegal, DPMAB stated that since his first accusation is without merit, so is his second. As to his comments about the selecting of benchmark records, DPMAB stated that it has already been pointed out that the quality of records in each gray zone is identical. In view of the policy of selecting 10 benchmark records (5 selects, 5 nonselects) when possible, it is practical to select the benchmarks from a panel that has an ample number of records in its gray zone. DPMAB stated that it should be noted that the numerical scores from the original board have nothing to do with the numerical scores given to the benchmark records by an SSB, only the select/nonselect status of the benchmark records is important. Because the benchmark records are very similar in quality (having come from the same score category of the original board), it is not unusual to have some inversion in the benchmark order of merit (OOM) created by the SSB. Usually, inversion is of no consequence as very often the considerees' record receives the lowest score or is among the lowest score. Regardless of the situation, SSB members are not informed which record is a benchmark record or a consideree record.

DPMAB stated that the application contains faulty logic, incorrect statements, directives/statutes/regulations taken out of context, and is totally unfounded. A complete copy of this evaluation is appended at Exhibit E.

The Chief, Promotion, Evaluation and Recognition Division, HQ AFPC/DPPP, reviewed this application and recommended it be denied. DPPP stated that the application is timely only as it pertains to the OPR closing May 92. With regard to the Air Force advisory opinions pertaining to the evaluation process, the PRF process and the board process, respectively, DPPP agrees with their assessments.

with regard to the contested OPRs, DPPP stated that the raters' claims that they could have provided a better report if there had been formal feedback sessions are not convincing. Each of the OPRs contains a block immediately following the rater's overall assessment to document reasons for no performance feedback. Absence of information in this block is equivalent to the rater certifying that performance feedback did, in fact, occur. DPPP indicated that the applicant speculates his OPRs were erroneous and therefore the board considered erroneous information. The space for written information on the OPR form is limited. DPPP stated that the OPRs did not contain erroneous information, they just did not contain the information the applicant believes should have been included on the reports. DPPP points out that it is the rating chain, not the ratee who determines what information is included on an OPR. The willingness of the evaluators in the applicant's rating chain to now reaccomplish the reports does not make the original reports erroneous.

DPPP stated that the applicant provided no support for his request to upgrade the CY93B (P0493B) PRF to a "Definitely Promote." In his arguments concerning the PRF, the applicant continually equates an MLEB with a central selection board. DPPP points out that the statutes on which the applicant relies govern central selection (promotion) boards only; therefore, his arguments are without merit. DPPP stated that Air Force policy is clear - in order to effectively challenge a PRF, both the senior rater and the MLEB president must support the requested change. The senior rater addresses only the OPR issue, and the MLEB president is not heard from.

DPPP indicated that evaluation reports receive exhaustive reviews prior to becoming a matter of record. Given a retrospective view, any report can be rewritten to make it more hard hitting, to provide embellishments, or enhance the ratee's promotion potential. The evaluators in this case do not explain how they were hindered from rendering a complete and accurate assessment of the applicant's performance prior to the report being made a matter of record.

DPPP views this appeal as nothing more than an attempt to rewrite history based on a retrospective view following the applicant's nonselection for promotion. DPPP strongly recommends denial of all requested actions. However, if the Board determines relief is appropriate, they urge against granting direct promotion. DPPP stated that the applicant did not ask for SSB consideration and argues the legality of the SSB process. However, absent clear-cut evidence the applicant would have been a selectee had the contested reports not been considered, DPPP believes a duly constituted selection board applying the complete promotion criteria is in the most advantageous position to render this vital determination. Therefore, if the Board directs the reaccomplished reports be accepted for file, SSB consideration by CY93B (6 December 1993) and CY94A (22 August 1994) Major Boards would be appropriate.

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

The Staff Judge Advocate, HQ AFPC/JA, stated that they agree with HQ AFPC/DPPP that the application is timely only as it pertains to the OPR closing May 1992. JA indicated that the OPRs challenged in this case were written in 1990, 1991-1992, yet the application was filed 1 February 1995. By law, a claim must be filed within three years of the date of discovery of the alleged error or injustice. JA stated that it is obvious that the errors claimed here were discoverable at the time they occurred; applicant has offered absolutely no substantiation for a claim that they were not discovered until 1993. Nor has he offered any explanation for filing late. JA would normally recommend that the application be denied as untimely, however, they are aware that the Board has determined that it must adhere to the holding in *Detweiler v. Pena* - which prevents application of the

statute's time bar if the applicant has filed within three years of separation or retirement.

With respect to the applicant's challenge to the validity of the OPRs and PRF, JA can discern no legal issue, and they defer to the HQ AFPC/DPPP advisory. JA indicated that even if the applicant were correct that his three OPRs should be corrected, it would not automatically follow that his CY93 PRF should be upgraded to a definitely promote (DP). JA stated that the applicant's brief in that regard departs from any logical analysis in suggesting that corrections to the reports somehow translate ipso facto into a DP. The alleged "incomplete promotion recommendation" and inability "to compete fairly for one of the few 'Definitely Promote' recommendations" would only mean that a new PRF would be required. The actual recommendation, however, would still be a matter for senior rater and management level determination. JA noted that no support has been provided for an upgrade to the applicant's PRF.

JA noted that the applicant alleges that he was denied his right to fair and equitable consideration for promotion because he was forced to compete against officers, three-fourths of whom were from major commands using "special" promote recommendations. JA stated that despite applicant's charts, he has offered absolutely no proof that the use of "special promote" PRFs prejudiced him at his IPZ promotion board. The burden of proof rests with the applicant, and in the absence of any evidence of error, the Board is not in a position to render relief. JA has previously opined that the governing regulation, AFR 36-10, does not prohibit the use of stratified "promote" recommendations and it violates neither the letter nor spirit of any portion of the regulation.

JA stated that the bulk of applicant's submission is the latest version of the canned brief attacking the Air Force's promotion recommendation and promotion systems. It begins with the claim that the PRF process is contrary to statute because the Management Level Evaluation Board (MLEB) acts as a de facto promotion board, and the results of the MLEB are "confirmed" by the central board at a rate approaching 100%. JA stated that in drawing that conclusion, applicant relies upon statistics that show that close to 100% of the officers who have received DP promotion recommendations have been selected for promotion. As JA noted previously, the very high rates of selection for promotion of officers with DP recommendations was fully expected and consistent with the aims of the officer evaluation program. JA stated that the OES program fully comports with the law and governing regulations.

The officer evaluation system (OES) is just that - a system of evaluation and not one of ultimate selection for promotion. It is the function of the OES to assist central selection boards to carry out their statutory duties and not to preempt or replace that process. JA indicated that the applicant's argument that officers receiving DP recommendations constitutes a pre-selection

of these officers, thereby effectively usurping the selection board statutory authority, ignores reality and is, in their (JA) view, totally unsubstantiated. Senior raters, management level evaluation boards and "aggregate" boards are all part of the Air Force's evaluation system designed to assist in the promotion process. Certainly critical to the applicant's argument is his inescapable conclusion that selection boards are necessarily ignoring their statutory obligation to fully consider the records of all candidates and thereafter exercise their independent authority to select only the best qualified. JA stated that the Board should not, in the absence of proof, entertain such a notion. Selection boards are instructed that they are to make the selections for promotion; PRFs are aids in that process and nothing more. To suggest, as applicant does, that selection boards only compare the "promote" records with one another after having "rubber stamped" the selection of all definitely promote candidates assumes a total abandonment of their responsibilities by board members. In the absence of proof of such serious charges, JA must presume that selection boards have followed their instructions and performed their duties in the prescribed manner.

JA indicated that the PRF process is merely the latest in a line of procedures used by the Air Force to assist promotion boards in identifying the best qualified officers for promotion. Contrary to the applicant's implications, an **MLEB** does not determine who will receive particular promotion recommendations. Rather, the **MLEB** determines only Definitely Promote (DP) allocations. **An** officer's senior rater still must apply the allocations and ultimately decide which officers receive which recommendation or are submitted for 'aggregation. "

JA stated that applicant's position seems to presuppose that all boards are 10 U.S.C., Section 611(a), promotion boards - this is not true. JA indicated that the applicant's argument that **MLEBs** are flawed because they fail to incorporate the safeguards required for 10 U.S.C., Section 611(a), boards is totally without merit. Promotion selection boards are controlled by Title 10 and **MLEBs** are part of the Air Force's internal evaluation system, it is not part of the promotion selection process. As a consequence, Title 10 requirements do not--and should not--apply to **MLEBs** or any other aspects of the **OES**. To require otherwise would suggest that **OES** is not an evaluation process, as it is, but merely a part of the promotion process.

The applicant avers that promotion selection boards in the Air Force are contrary to Air Force regulation, DoD Directives and statute. Specifically, he argues that promotion board panels operate independently of one another, thereby rendering as impossible the promotion recommendation by "a majority of the members of the board" mandated by 10 U.S.C. 616 and 617. JA stated that there is no provision of law that specifically requires 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 (P.L. 97-22) specifically references panels as a type of administrative subdivision of selection boards. JA indicated that 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.

JA indicated that the 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. In JA's opinion, 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.

JA disagrees with the applicant's argument that the board president's duties in the Air Force promotion process violates DoD Directive 1320.12, Section F, para 2(a)(1). The duties prescribed for board president by Air Force directives do require the president to perform several critical duties relative to board scoring. However, those duties do not, in any manner, constrain the board from recommending for promotion the best qualified among the fully qualified officers being considered. JA stated that the 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.

JA indicated that the author of applicant's brief claims, in the 15 December 1995 addendum, that the likely cause of the Air Force's multiple and heinous violations of law and regulation was its failure to adhere to DOD requirements to develop and issue standard operating procedures. JA stated that the author of the brief takes a totally illogical leap in his analysis. Even if one were to agree with his specious arguments alleging the "intolerable, flagrant abuses of discretion by Air Force officials charged with management of the promotion system," it does not follow that the remedy for such behavior would--or should--include this applicant's promotion. JA indicated that the applicant has failed to present any evidence whatsoever that the systematic errors he alleges were responsible for his promotion nonselection.

The applicant claims that his nonselection cannot be remedied by special selection board (SSB) consideration. He bases this on two reasons: (1) the benchmark records that would be used in an SSB are invalid because the original promotion boards that rendered them were illegal; and, (2) scoring procedures used by Air Force **SSBs** are arbitrary and capricious. JA stated that the

applicant has not provided a meritorious application warranting the need for any relief. As for the merits of these claims, JA concurs with the conclusions of HQ AFPC/DPPB in its advisory. In JA's opinion, the Air Force's SSB procedure fully comports with the 10 U.S.C., Section 628(a) (2) requirement. The burden is on the applicant to prove otherwise, and he has failed to do so.

As to the applicant's request for direct promotion, JA indicated that both Congress and DoD have made clear their intent that errors ultimately affecting promotion should be resolved through the use of special selection boards. JA indicated that in promotion matters, the Board's statutory authority should be limited to correcting military records which may have affected the promotion process and recommending SSB consideration in appropriate cases.

JA stated that the applicant has failed to present relevant evidence of any error or injustice warranting relief. For the reasons outlined above, JA recommended the applicant's request be denied.

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

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant reviewed the advisory opinions and referenced the Soldiers and Sailors Civil Relief Act. Thus, the Board should consider his case on merits as a time bar does not apply. He has documented violation of AFR 36-10 - the OPRs as written claim feedback was given, but it was not -- as his reporting officials clearly stated. This alone should be an adequate basis to remove these reports as they are plainly in error or technically flawed. As each evaluator has agreed with replacement of these forms, he asks the Board to grant a full measure of relief and insert the OPRs which would have been written had his evaluators completed the feedback required by regulation. In view of the documentation of error (duty title in error, comments and overall recommendation did not reflect his true performance based potential) and concurrence by his senior rater to amend the contested PRF, he asks the Board to correct his PRF to reflect the recommendation he would have received had it not been for errors in the evaluation process. As to illegal MLEB procedures, 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. He indicated that as the evidence demonstrated, the 'special' promote recommendations effectively 'took away' promotions from officers who received 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 to a Definitely Promote recommendation.

With regard to defective selection boards, he stated that the selection boards which considered his file were held in violation of statute and DOD Directive. He indicated that the requirements of 10 U.S.C., Section 616(c), are unequivocal: "A selection board may not recommend an officer for promotion unless the officer received the recommendation of a majority of the members of the board." The Air Force selection boards which considered his file did not allow board members either the knowledge of the officers recommended to make this decision nor did they allow a majority of the members of the board to form the required consensus. Therefore, the results of these boards are without effect, and he asks the Board to set aside the results of these illegally held selection boards. He stated that Air Force selection boards do not comply with 10 U.S.C. Section 617. The results of the boards that considered his file for promotion did not meet the minimum requirements of law. In fact, the certification process used by Air Force selection boards is nothing more than an attendance roster! As actions in violation of law are without effect, he asks the Board to set aside the nonselections he incurred at the **CY93** and **CY94** Major Selection Boards. He indicated that as the required separate boards were not held, he was denied the protection envisioned by DODD **1320.12**. He stated that Air Force selection boards give final recommendation authority to the board president - not the majority of the members of the board as required by law. This contravenes not only DODD **1320.12** requirements, but also 10 U.S.C., Sections 616 and 617. This violation of higher level directives alone would justify set aside of his nonselections for major which he asks the Board to direct. In view of the admitted and deliberate violation of **1320.12** requirements, he asks the Board to direct his promotion to the grade of major as if selected by the **CY95** Major Board. In view of the total disregard by Air Force officials for higher level directive and the law, only the Board can intervene and grant full and fitting relief.

He asks the Board to correct his record to reflect selection to major as if selected by the **CY93** Major Board. The basis for this request is twofold: (1) The Board is required to provide full and fitting relief and direct promotion is within the authority of the Board; and (2) A Special Selection Board (SSB) cannot provide a full measure of relief.

In support of his request, applicant submits a statement from the senior rater of the contested PRF, a reaccomplished PRF, statements from his former rating chain and additional documents associated with the issues cited in his contentions.

In response to HQ AFPC/JA's advisory opinion, he stated that again AFPC has dismissed the errors in his OPRs, but at least this time AFPC/JA acknowledged the errors on the OPRs could have led to an error on the PRF(s). He indicated that while AFPC argues Air Force has the prerogative to use virtually any evaluation system it wants, AFPC/JA ignores or misrepresents the real issue in his case: The illegal top promote system. He

stated that the plain language of the law is controlling, and the Board can easily test the Air Force procedures to determine if it meets the standards required by law and directive. Case law on the impact of procedural violations is equally clear. He quotes from the Dovle v. United States court case. The concept in Dovle has been confirmed again in Roane v. U.S., a recently published decision from the Court of Federal Claims. He stated that the Roane court confirmed again both concepts (compliance with statute required, impact of procedural error) and found the Air Force selection board procedure was not in compliance with law. He indicated that none of the AFPC advisories address Dovle. In Dovle, he stated that the court provides clear unambiguous standards to determine the impact of a procedural error in the selection board process. The court has already determined the errors in the Air Force process were \\serious,substantial, and directly related to the purpose and functioning of selection boards."

As detailed in his petition, the evidence proves major deficiencies in the Air Force selection board process. The evidence in his petition and rebuttal clearly proves:

--The selection board process does not allow a majority of the members of the board to find that each officer is best (and fully) qualified for promotion (10 U.S.C., Section 616).

--The selection board process does not allow the certification of the list of officers (10 U.S.C., Section 617) as neither the list nor the purported report of proceedings exists when board members sign the attendance roster.

--The selection board process does not allow each selection board to compete a separate report as only one report was completed for a session of several selection boards for several competitive categories (10 U.S.C., Section 617, DODD 1320.12).

--The selection board process did not allow SAF approval or the role of the board president at the boards which considered his file (DODD 1320.12).

--The selection board process without issuance, approval, or use of the required Standard Operating Procedures (SOPs) for selection board operations and administrative support thereof (DODD 1320.12).

He has provided the Board with the tools by which they can easily test the Air Force process to determine if the problems with Air Force selection boards which considered his file were \\serious, substantial, and directly related to the purpose and functioning of the selection boards." Each test will drive home the conclusion the Air Force process was not only contrary to law and directive, but these violations went to the heart of the selection process.

He stated that the Board can see the errors in the Air Force process are certainly 'directly related to the purpose and functioning of selection boards' - the failure to allow a majority of the members of the board to find each and all officer(s) recommended for promotion is certainly at the heart of the statutory requirements for selection boards. AFPC provides no information to prove these requirements can be met and, in fact, the Board can easily see the process denies board members the opportunity to comply with 10 U.S.C., Section 616. He stated that as in Roane, the Air Force selection boards which considered his file did not allow board members either the knowledge of the officers recommended to make this decision nor did they allow a majority of the members of the board to form the required consensus. AFPC does not dispute as few as two members can determine the select status of an officer - all without knowledge of other board members or the knowledge of the majority of the members of the board. Therefore, the results of these boards are without effect, and as in Roane, his "nonselections. . . are void." He indicated that as evidence proves, the required separate boards were not held. Each board president at the selection boards, which considered his file, had duties which had never been prescribed by SAF. As these duties clearly represented a violation of the due process guaranteed him by the directive. He stated that Air Force selection boards give final recommendation authority to the board president - not the majority of the members of the board as required by law. This contravenes not only DODD 1320.12 requirements, but also 10 U.S.C., Sections 616 and 617. This violation of higher level directives alone would justify set aside of his nonselections for major. In view of the deliberate violation of DODD 1320.12 requirements, he asks the Board to direct his promotion to the grade of major as if selected in-the-promotion zone.

He has documented Air Force selection board procedures and the deficiencies within the Air Force selection board process. He has provided the Board with a complete and thorough discussion of the pertinent case law regarding procedural defects in selection boards. He stated that the Air Force evaluations avoided discussion of the issues as indicated in his Brief (page 25). He further indicated that "the advisory opinions would appear to violate AFI 36-2603, paragraph 8.1. He references the Roane case and asks the Board to direct his record be corrected to reflect that he served on continuous active duty with all pay, entitlements and other benefits since he was separated as a result of illegally held selection boards. He believes that the evidence proves direct promotion is within the Board's authority and that SSBs cannot provide a full, let alone fitting measure of relief. He asks the Board to direct that his record be corrected to reflect selection for promotion to major as if selected by the CY93 Major Board.

Complete copies of applicant's response is attached at Exhibit I.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.

2. The application is timely only as it pertains to the OPR closing 9 May 1992 and the Promotion Recommendation Form (PRF). The application pertaining to the OPRs closing 9 May 1990 and 9 May 1991 was not timely filed; however, it is in the interest of justice to excuse the failure to timely file the application.

3. Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice with regard to the contested Officer Performance Reports (OPRs) closing 9 May 1990, 9 May 1991 and 9 May 1992. After reviewing the evidence of record, we are persuaded that the contested reports are not accurate assessments of applicant's performance. In this respect, we note the statements provided from the rating chain members indicating that, due to the absence of formal feedback, the applicant's accomplishments were not clarified prior to the reports being finalized. Hence, the reports in question are inaccurate. Based on the statements from the evaluators of the contested reports and on the fact that a formal feedback did not occur as required by the governing regulation, we recommend the contested reports be declared void and replaced with the reaccomplished OPRs provided. In addition, the closing dates on the May 1990 and May 1991 reports should be corrected as indicated below.

4. Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice with regard to the Promotion Recommendation Form (PRF) for the CY93B Major Board. We are persuaded by the senior rater's statement that the contested PRF is inaccurate. In this respect, we note that the senior rater specifically recommended that the duty description be corrected to accurately reflect the applicant's duties. The reason for the duty description not being updated was due to the reorganization of the directorate. In view of the foregoing, we recommend that, instead of replacing the contested PRF as the applicant requested, it should be corrected by substituting the comments contained in Section III, Job Description, of the PRF in question with the comments contained in Section III of the reaccomplished PRF.

5. We do not find the evidence presented supports favorable consideration of the applicant's request for a "DP" recommendation on the contested PRF. Other than his own assertions, we have seen no evidence by the applicant which would lead us to conclude that had his corrected record been available during the processing of the PRF, when comparing his record with those of his peers, such a recommendation would have been awarded.

6. As a consequence of the corrections the applicant's records we propose, his selection record was inaccurate at the time he was considered for promotion to the grade of major by the CY93B and CY94A selection boards. We have noted the applicant's requests that his nonselections for promotion to the grade of major be set aside and for direct promotion to the grade of major. However, we do not believe such action would be appropriate since the applicant's eligibility for promotion consideration by the above cited boards is not in question. We believe that a duly constituted selection board, applying the complete promotion criteria, is in the most advantageous position to render this vital determination, and that its prerogative to do so should only be usurped under extraordinary circumstances. After reviewing the available evidence and the applicant's record, we are unpersuaded that the duly constituted SSBs, when comparing his corrected record with those of his peers, would have insufficient evidence of the applicant's performance and demonstrated potential on which to base reasonable decisions concerning the impact the uncorrected record had on his opportunities for promotion. Therefore, it is our opinion that the most appropriate and fitting relief is to place the corrected record before Special Selection Boards (SSBs) for consideration by the CY93B and CY94A Major Selection Boards. Based on the foregoing, we conclude that there is no basis upon which to recommend favorable action on the applicant's requests to set aside his nonselections for promotion to the grade of major and for direct promotion to the grade of major.

7. The applicant's numerous assertions concerning the statutory compliance of central selection boards, the legality of the promotion recommendation process, and the legality of the Special Selection Board (SSB) process, are duly noted. However, we do not find these assertions, in and of themselves, sufficiently persuasive to override the rationale provided by the respective Air Force offices. Therefore, we agree with the recommendations of the appropriate Air Staff offices and adopt the rationale expressed as the basis for our decision that the applicant has failed to sustain his burden of establishing that he has suffered either an error or an injustice.

8. 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.

THE BOARD RECOMMENDS THAT:

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

a. The Company Grade Officer Performance Reports, AF Forms 707B, rendered for the periods 10 May 1989 through 9 May 1990, 10 May 1990 through 9 May 1991 and 10 May 1991 through 9 May

1992, be declared void and removed from his records and the attached reaccomplished Officer Performance Reports (OPRs) be accepted for file in their place.

b. The closeout dates on the reaccomplished OPRs be changed from 10 May 1990 to 9 May 1990 and from 10 May 1991 to 9 May 1991.

c. The comments contained in Section 111, Job Description, of the Promotion Recommendation (PRF), AF Form 709, prepared for consideration by the Calendar Year 1993B Major Board, which convened on 6 December 1993, be deleted from that document and the comments contained in Section III of the attached reaccomplished PRF be substituted in their place.

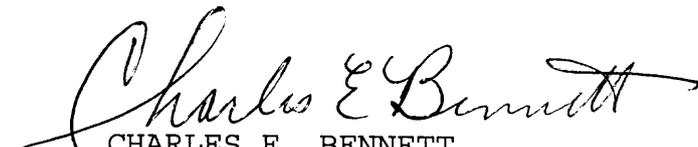
It is further recommended that he be considered for promotion to the grade of major by Special Selection Boards (SSBs) for the Calendar Year 1993B and Calendar-Year 1994A Central Major Selection Boards, with inclusion of the reaccomplished OPRs and the corrected PRF, and, if he is selected for promotion to the grade of major, the results of the particular Special Selection Board be made available to the Air Force Board for Correction of Military Records at the earliest practicable date so that all necessary and appropriate actions may be taken consistent with his selection for retroactive promotion.

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 Chairman
Mr. Gregory H. Petkoff, Member
Mr. John L. Robuck, Member

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

- Exhibit A. DD Form 149, dated 1 Feb 95, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, HQ AFMPC/DPMAJEP, dated 1 Mar 95.
- Exhibit D. Letter, HQ AFMPC/DPMAJEB, dated 28 Mar 95.
- Exhibit E. Letter, HQ AFMPC/DPMAB, dated 4 Apr 95.
- Exhibit F. Letter, HQ AFPC/DPPP, dated 20 Nov 95.
- Exhibit G. Letter, HQ AFPC/JA, dated 8 Apr 96.
- Exhibit H. Letters, SAF/MIBR, dated 4 Dec 95 and 26 Sep 96.
- Exhibit I. Letters from applicant, dated 15 Dec 95, w/atchs, and 15 Dec 96, w/atchs.


CHARLES E. BENNETT
Panel Chairman