

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBERS: 96-01049 (Cs #2) &
96-03731 (Cs #3)

[REDACTED]
[REDACTED]
COUNSEL: [REDACTED]

HEARING DESIRED: Yes

MAY 20 1997

APPLICANT REQUESTS THAT:

1. His selection for promotion to the grade of major by the Calendar Year 1994A (CY94A) Major Board be restored with an effective date of rank (DOR) of 1 November 1995. (Case #2)
2. His permanent change of station (PCS) assignment to HQ USAF, Washington, D.C., be reinstated. (Case #2)
3. The referral Officer Performance Report (OPR) for the period 9 June 1995 through 20 May 1996 be declared void and removed from his records. (Case #3)

APPLICANT CONTENDS THAT:

Regarding Requests 1 & 2:

These actions were unjust and the result of unresolved personality and opinion differences between the [REDACTED] Air Control Squadron (ASC), ACC, commander ([REDACTED]) and himself. [REDACTED] who told him he was doing a good job, actually sought to end his career. [REDACTED] initiated an investigation on him regarding a family matter which was previously resolved in a civil court. He's worked hard and performed well for four years at [REDACTED] and [REDACTED] AFBs. He provides statements attesting to his abilities and achievements. He also provides documentation pertaining to the events mentioned in the "Statement of Facts" section below.

Regarding Request 3:

The contested report makes false statements, uses inappropriate language, and cites an unjust reprimand given under unfair conditions. Contrary to what is said on the OPR, he was not found guilty by state court of harassing his tenant and destroying property. He was not convicted on any charges. Also, the period of the OPR is incorrect. Two separate reports were required for this period: one for 9 Jun-23 Oct 95 when he was assigned to [REDACTED], and another for 24 Oct 95-20 May 96 when he was transferred to the 20th Operations Group (OG). The 20 May 1996 change of reporting official (CRO) should have resulted in a separate report for the period 23 Oct 95-20 May 96. This would have shown his performance as exemplary. He provides a

Classification/On-the-Job Training Action form and a letter from the rater of the contested report to support his claim.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

Applicant is currently a captain (DOR: 21 Nov 87) assigned to [REDACTED]

Documents relevant to the following events are provided for review at Exhibits A and C.

During the period in question, the applicant was assigned to the [REDACTED] ASC, ACC, at [REDACTED] AFB, as a maintenance officer. He also served as detachment commander (Detco) of Det 7, [REDACTED] Operations Group (OG), from 5 January to 18 February 1994.

In a letter dated 16 February 1994, the [REDACTED] OG commander advised the [REDACTED] ASC commander of applicant's duty-related problems while the [REDACTED] OG Detco, i.e., lack of operational experience and a tendency to bypass normal chain of command. Specifically, the [REDACTED] OG commander indicated that applicant on several occasions made agreements with US Military Group (USMILGRP) Peru without coordinating with [REDACTED] OG personnel, which had an impact on the operation of the detachment. In addition, applicant's reports to higher headquarters often contained inflammatory language about the host nation and he continued to bypass normal command channels after being repeatedly counseled.

Applicant was subsequently removed from his position as [REDACTED] for cause.

On 16 June 1994, he received a Letter of Reprimand (LOR) for failure to follow [REDACTED] direct order to consult with him before relieving key squadron supervisors. Applicant rebutted the LOR.

On 17 July 1995, after obtaining permissive TDY, the applicant appeared as a defendant in a [REDACTED] proceeding charged with fourth degree burglary, battery, malicious destruction of property of a value of about \$300.00, and three counts of telephone harassment. The victim was his sister. The court initially found him guilty of one count of telephone abuse and the malicious destruction of property. Subsequent to the applicant's motion, the court struck the guilty judgment and he was offered probation before judgment and ordered to pay restitution in the amount of \$225.00 to the victim. The burglary charge was not prosecuted. He was found not guilty of the battery of his sister and of two counts of telephone harassment. Since he successfully completed the probation, his record was cleared and

no conviction was recorded. (Detailed background information on this situation is provided in Exhibits A and C.)

Applicant was initially considered and selected by the CY94A board, which convened on 22 August 1994. His Promotion Recommendation Form (PRF) reflected an overall recommendation of "Promote." He was officially notified of his selection for promotion to major on 30 October 1994, with a scheduled promotion date of 1 November 1995.

On 21 August 1995, subsequent to a phone call from the applicant's sister regarding the charges she had brought against him (see above), Lt Col G-- directed an OSI investigation be conducted. The investigation concluded on 18 December 1995.

Applicant received another LOR on 3 October 1995 for failing to obey [redacted] direct order to provide him suitable candidates to fill an embassy liaison position in South America. Applicant had nominated himself and, when told to identify an alternative, responded that no one else was capable of doing the job. As a result, an Unfavorable Information File (UIF) was established on 13 October 1995. Applicant provided a rebuttal.

On 23 October 1995, applicant was given a duty title of Special Assistant to [redacted] OG commander.

Applicant was verbally notified on 30 October 1995 that his promotion was delayed. The basis was the preliminary OSI investigation regarding his situation with his sister. On 13 November 1995, the [redacted] OG commander notified applicant of initiation of action to delay promotion to 1 May 1996, and applicant acknowledged receipt and understanding. He submitted a rebuttal on 14 November 1995. On 21 November 1995 the file was found legally sufficient to delay promotion. On 16 January 1996, the ACC commander approved the request for delay to 1 May 1996.

On 15 March 1996, the [redacted] OG commander notified the applicant that he was recommending the applicant's name be removed from the major promotion list. Specified reasons, in part, were: his removal as the [redacted] OG Detco; the actions which prompted the two LORs; counseling and performance feedback sessions on 14 November 1994, 30 January 1995, and 13 October 1995 regarding personnel decisions, missed staff meetings and demeanor, and poor judgment and officership; and essentially misleading [redacted] regarding his request for permissive TDY (to attend the [redacted] hearing or informing [redacted] of the findings of the trial. Applicant responded, in part, that he consented to probation before judgment and probation has since been lifted [on 13 Nov 95], that this was not a conviction; that he had informed [redacted] he could obtain details from the ADC regarding the permissive TDY. Applicant's detailed rebuttal to the 15 March 1996 letter is provided at Exhibit A.

In a follow-on letter to the applicant dated 8 April 1996, the [redacted] OG commander amended his recommendation to include an attached OSI report dated 22 March 1996.

On 30 April 1996, the Staff Judge Advocate (SJA), [redacted] Fighter Wing, rendered a legal review of the Removal from Promotion List Action. The SJA indicated that, while there was no question that the applicant demonstrated technical expertise in his field, he lacked the command skills necessary to fulfill the grade of major. The SJA concluded that the evidence was legally sufficient to support a recommendation for 'removal from the promotion list to the grade of major.

On 7 May 1996, ACC advised AFPC that commander had initiated removal action. ACC/JA found the file legally sufficient for removal from promotion action.

On or about 30 July 1996, the contested OPR was referred to the applicant. The rater had indicated applicant met all performance factors. However, the additional rater amended the report to reflect "Does Not Meet Standards" in Leadership Skills, Professional Qualities, and Judgment & Decisions. The additional rater also commented, in part, that the applicant ". . . was found guilty by state court of harassing tenant and destroying property." Applicant and his counsel responded and included an explanation of the court action. On 6 September 1996, after considering the applicant's rebuttal, the reviewer concurred with the additional rater's assessment and ratings.

On 9 September 1996, the Secretary of the Air Force directed that applicant's name be removed from the promotion list. She indicated that in deciding this action, she specifically disregarded all performance feedback data included in the case file.

Applicant will be eligible for promotion consideration at the next board scheduled to convene on 16 June 1997.

AIR FORCE EVALUATION:

Regarding Requests 1 and 2:

The Assignment Advisor, AFPC/DPAIP2, indicated that, if it is found that actions relating to applicant's promotion were unjust, then reinstatement of assignment to HQ USAF, Washington, D.C., is appropriate.

The Officer Promotion Management, AFPC/DPPPO, recommends all aspects of this application be denied. AFI 36-2501 requires that commanders question promotion when the preponderance of the evidence shows the officer is not mentally, physically, morally, or professionally qualified to perform the duties of the higher grade. Formal rules of evidence do not apply to a Promotion

Propriety Action. In this case, the commander was within his authority to request promotion delay and removal.

The Staff Judge Advocate, AFPC/JA, provided two advisories. The author indicates that the procedural aspects of the Promotion Propriety Action were followed in the instant case. The 15 March letter of notification **does** improperly include three AF Form 724s, Performance Feedback Worksheet (PFW). Use of PFWs for any personnel action was prohibited by AFR 36-10 unless it was first introduced by the officer. The applicant addresses the PFWs in his response but did not first raise the matter. Therefore, use of the PFWs is inappropriate and the Board should not consider them or references to them in making its decision. Nevertheless, the author believes there is more than ample evidence to support the removal, and notes the Secretary must have been advised of this flaw in the package as her action specifically mentions that she disregarded the PFWs. The applicant articulates his personal disagreement with the actions taken against him but has not provided any evidence from anyone in his chain of command that supports his view that all the actions were somehow unjust **or** overblown. The statements he provides attest to his performance at other times and places but do not directly address his current dilemma. Applicant's response, in many instances, is little more than quibbling and blame-shifting. The standard used in determining whether removal from a promotion list is appropriate is whether the preponderance of evidence shows that the officer is professionally unfit to assume the duties of the next higher grade. In this case the chain of command and the Secretary have concluded that the applicant was not fit and removed him from the promotion list. Nothing in his submission demonstrates that an injustice occurred which should be corrected by the Board. The Secretary did not abuse her discretion in removing him from the promotion list and her action is fully supported by the evidence of record. The author recommends these two requests be denied.

Regarding Request 3:

The Staff Judge Advocate, AFPC/JA, indicates that the response to the referral report by the applicant and his counsel is an official part of the OPR document; therefore, the author would argue that, taken as a whole, the document gives an accurate picture of applicant's encounter with the law. The author disagrees with the applicant's underlying assertion that since there was ultimately no conviction because of his successful completion of his probation, the whole episode is not fair game for comment in his OPR. The author views the action taken in applicant's civil case as an "action tantamount to a finding of guilty." Should the Board find that the OPR as currently written, to include the applicant's response, is misleading, then it is suggested that the following be substituted: "Also had action taken by a state court that was tantamount to a finding of guilty of harassing tenant and destroying property when he was placed on probation before judgment."

The Chief, Appeals & SSB Branch, AFPC/DPPPA, believes that, since the probation before judgment is discussed in the applicant's rebuttal comments attached to the contested report, there is no reason to replace the comment in question. Further, the additional rater is not heard from. The form applicant provides regarding a job change does not reflect other signatures to show the change was approved--it is only signed by the commander. The report on individual person (RIP) provided by the applicant does not show who the new rater was. Since the applicant did not provide replacement reports covering the two time periods, the author can only conclude that this is merely an attempt on the applicant's part to prove the referral report is invalid. It is apparent that the substandard behavior beginning in 1994 continued through the contested reporting period. The removal from the promotion list package documents the applicant's substandard performance during the contested rating period. The author is not convinced the contested report is inaccurate as written and recommends that it remain in the record as is.

Complete copies of the Air Force evaluations, with attachments, are provided at Exhibits C, D, E, F and G.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Regarding Requests 1 and 2:

Applicant and counsel reviewed the advisory opinions. Applicant elaborates on his circumstances and believes the entire matter has been exaggerated and personalized as a result of personality differences between himself and Lt Col G--. In view of the [AFPC/JA's] derogatory comments about his character, he sought a psychological evaluation, which he provides. He also provides a polygraph test to show he is being truthful. He showed no deception. Counsel contends that the file does not contain anything remotely suggesting an officer with an inferior record. The applicant has been insulted by an attorney-advisor employing highly inappropriate personal comments, which should be totally disregarded. In support, applicant provides a letter from the 24th OG commander. The commander states that, while he cannot retract the deeds attributed to the applicant in his [16 February 1994 letter to the 726th ASC commander regarding applicant's duty-related problems while the 24th OG Detcol], he acknowledged that the applicant was suspended between two seemingly conflicting organizations. He adds that applicant's difficulties were not uncommon. He adds that as a captain and a communications officer, the applicant was not suited to command that unit. He believes that applicant's unit underestimated the challenges and that it was not fair to the applicant or the mission to have selected him for that position. Consequently, he feels it is now unfair that the applicant should be denied promotion.

Regarding Request 3:

Applicant argues that when a CRO occurs, and the previous rater has 120 or more days supervision, the previous rater must

provide a performance report. His rater, from 9 Jun-23 Oct 95 was Lt Col G--. The October 1995 performance feedback and the 1996 performance reports were accomplished by different people. Whether the suggested wording can be 'squeezed into the blank remaining is of no moment. What is important is that the Maryland Court [situation] is mischaracterized. This is unfair in terms of due process.

Applicant's complete responses, with attachments, are provided at Exhibit I.

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 a thorough review of the evidence of record and applicant's submission, we are not persuaded that his promotion to major and assignment to HQ USAF should be reinstated, or that the contested OPR should be voided. Applicant's contentions were duly noted and the documentation he provided carefully considered. However, we do not find these assertions, in and by themselves, sufficiently persuasive to override the rationale provided by the Air Force. The arguments the applicant makes and the materials he provides to this Board were previously considered by his chain of command and the Secretary of the Air Force. However, the Recommendation for Removal from the Promotion List was found legally sufficient and in compliance with all procedural requirements. We note the Secretary appropriately disregarded all performance feedback data. The removal action appears to be supported by the evidence of record and we find no basis upon which to conclude that it was unjust or inappropriate. Having reached that conclusion, we see no reason to reinstate the applicant's assignment to HQ USAF, which was canceled as a result of the promotion delay. With respect to the OPR, applicant's rebuttal is an official part of the report and, taken in its entirety, the OPR document appears to give an accurate picture of the applicant's encounter with the law. He has not provided persuasive evidence that the contested report is inaccurate, misleading, or unfair. We therefore agree with the recommendations of the Air Force and adopt the rationale expressed as the basis for our decision that the applicant has failed to sustain his burden that he has suffered either an error or an injustice. Therefore, we find no compelling basis to recommend granting the relief sought.
4. The documentation provided with this case was sufficient to give the Board a clear understanding of the issues involved and a

personal appearance, with or without legal counsel, would not have materially added to that understanding. 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 applications were denied without a personal appearance; and that the applications will only be reconsidered upon the submission of newly discovered relevant evidence not considered with these applications.

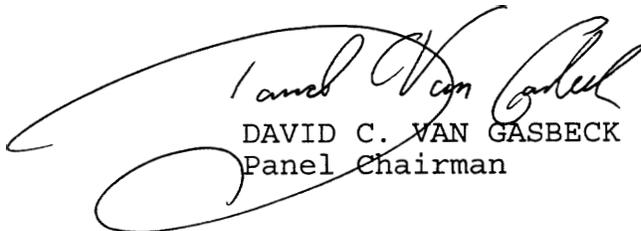
The following members of the Board considered these applications in Executive Session on 17 April 1997, under the provisions of AFI 36-2603:

Mr. David C. Van Gasbeck, Panel Chairman
Mr. Jackson A. Hauslein, Member
Mr. Richard A. Peterson, Member



The following documentary evidence was considered:

- Exhibit A. DD Forms 149, dated 11 Apr 96, w/atchs, and 12 Dec 96, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, HQ AFPC/DPAIP2, dated 26 Jul 96.
- Exhibit D. Letter, HQ AFPC/DPPPO, dated 19 Sep 96.
- Exhibit E. Letter, HQ AFPC/JA, dated 11 Oct 96, w/atchs.
- Exhibit F. Letter, HQ AFPC/JA, dated 3 Jan 97.
- Exhibit G. Letter, HQ AFPC/DPPPA, dated 15 Jan 97.
- Exhibit H. Letters (2), AFBCMR, dated 28 Oct 96 & undated.
- Exhibit I. Letters, Applicant & Counsel; dated 13 Dec 96, w/atchs; 18 Feb 97, w/watch; and 24 Feb 97, w/atchs.



DAVID C. VAN GASBECK
Panel Chairman