AUG 6 1998

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: [redacted]

DOCKET NUMBER: **93-01359**

COUNSEL: [redacted]

HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

The Officer Effectiveness Report (OER) closing 15 June **1988** be amended to reflect AF/XO indorsement or, that the report be amended in such a manner to clearly show the document was rendered under an illegal controlled indorsement system.

All Promotion Recommendation Forms (PRFs) written on him while the OER closing 15 June **1988** was on file be deleted.

His nonselections for promotion to the grade of lieutenant colonel by the **CY89** and all later boards be declared null and void.

His record be corrected to reflect selection for promotion to the grade of lieutenant colonel in the promotion zone (IPZ) by the CY89 lieutenant colonel board, and that he be awarded appropriate back pay, other entitlements and additional relief as appropriate.

APPLICANT CONTENDS THAT:

The contested report was prepared in violation of the governing regulation when the'indorsement level was determined by promotion eligibility rather than demonstrated job performance. The indorsement level was based on an illegal quota system imposed within AF/XO. This effectively "tainted" this OER, the most critical OER in his file as it was the "last" OER received, and it was near the top of his file when his record was considered for award of a "Definitely Promote" recommendation as well as for promotion at the CY89 (and later) lieutenant colonel boards.

The result of the illegal indorsement control system, which tainted the contested OER, became a compounding error. The Promotion Recommendation process relies on the "Record of Performance'' which is basically the officer's "OER/OPR" file. Therefore, as his record of performance was tainted, his senior rater did not have an accurate performance file upon which to base his recommendation, and the Management Level Evaluation Board (MLEB) was similarly denied a record of performance from

which to "quality review" his PRF and/or award any carry-over "DPs."

His accomplishments in Joint Stars, including several combat missions during Desert Storm, as well as his +2000 hours flying time were not seen by the boards. His record was also not complete as not all of his professional military education (PME) was included - PME completed in good faith both to demonstrate to promotion boards his intent to improve himself and to enhance his professional capabilities. Before the board, he had completed Air War College (AWC) by seminar, a fact not reflected within his record.

The promotion board and evaluation system board processes which considered his record for promotion were contrary to statute, DOD Directive, and Air Force regulation. Air Force promotion and evaluation procedures not only denied him substantial rights guaranteed by statute, DOD Directive, and regulation, but as a result of these violations, he was never nonselected for promotion by a legally convened board.

The MLEB (due to the procedures involved) effectively denied him several safeguards guaranteed by statute, and the whole MLEB process effectively usurps selection authority given specifically to "Selection Boards" convened under the guidelines of 10 USC Chapter 36.

An SSB would not be able to resolve his selection status for two reasons: (1) as a result of the illegally convened, illegally conducted board(s), the benchmark records would not be representative of the quality of the records at the "cut off" point for the board(s), and (2) the scoring system employed by the Air Force is arbitrary and capricious as the "benchmark records" do not reflect the "bottom scoring selectees and top scoring nonselectees." Therefore, request the Board grant a full measure of relief and correct his record to reflect selection for promotion at the **CY89** lieutenant colonel board.

In support of his request, applicant provided his 19-page statement, and a statement from the senior rater reflected on the PRF prepared for the **CY89** lieutenant colonel board. (Exhibit A)

STATEMENT OF FACTS:

On 4 September 1973, applicant was appointed as second lieutenant, Reserve of the Air Force, and voluntarily ordered to extended active duty. He served on continuous active duty, was integrated into the Regular component on 14 June 1977, and progressively promoted to the grade of major.

A resume of applicant's OERs/OPRs follows:

	PERIOD CLOSING	OVERALL EVALUATION
	13 Mar 74	Education/Training Report
	15 Mar 75	Outstanding
	5 Jan 76	1-1-2
	4 Jun 76	1-1-1
	28 Feb 77	2-2-2
	31 Aug 77	Abbreviated Report
	10 Oct 78	1-1-1
	8 Apr 79	1-1-1
	22 Jun 79	Education/Training Report
	23 Apr 80	1-1-1
	23 Apr 81	1-1-1
	23 Apr 82	1-1-1
	23 Apr 83	1-1-1
	20 Nov 83	1-1-1
	2 Jul 84	Education/Training Report
	2 Jul 85	1-1-1
	2 Jul 86	1-1-1
	15 Jun 87	1-1-1
*	15 Jun 88	1-1-1
#	25 Jan 89	Meets Standards
**	6 Oct 89	Meets Standards
##	1 Sep 90	Meets Standards
***	23 Aug 91	Meets Standards
###	23 Aug 92	Meets Standards

* Contested report. The final indorser on the report was the Assistant DCS/Plans and Operations.

- Top report on file when considered and nonselected for promotion by the CY89 Central Lieutenant Colonel Board, which convened on 15 May 1989.

** - Top report on file when considered and nonselected for promotion by the CY90 Lieutenant Colonel Board, which convened on 16 January 1990. Applicant was selected for initial continuation by the CY90 Major Selective Continuation Board.

- Top report on file when considered and nonselected for promotion by the CY91A Lieutenant Colonel Board, which convened on 15 April 1991.

*** - Top report on file when considered and nonselected for promotion by the CY91B Lieutenant Colonel Board, which convened on 2 December 1991.

- Top report on file when considered and nonselected for promotion by the CY92B Lieutenant Colonel Board, which convened on 16 November 1992.

(Examiner's Note: Copies of the contested OER and the PRFs for the CY89, CY90A, CY91A and CY91B lieutenant colonel boards are at Exhibit B.)

On 31 March 1993, applicant was relieved from active duty and retired effective 1 April **1993** under the provisions of AFR **35-7** (mandatory retirement on established date - maximum years of service). He was credited with 20 years and 12 days of active service for retirement.

AIR FORCE EVALUATION:

The Appeals and Analysis Branch, AFMPC/DPMAJA, reviewed this application and recommended it be time-barred. If considered, DPMAJA recommended denial for lack of merit. Their comments, in part, follow.

Noting applicant's contention that he was denied a lieutenant general indorsement to the contested OER by an illegal quota system, DPMAJA stated the initiative incorporated into IMC 85-1 to AFR 36-10, effective 1 April 1985, was that indorsement level deviations not be made solely to authorize indorsement by higher level evaluators. Not eliminated, however, were voluntary escalations consistent with the best interests of the Air Force. Even though the OER was forwarded to the office of the AF/XO, the decision to sign or not sign, was the AF/XO's.

The individual who signed the statement provided with applicant's appeal, stated he had made the decision, finally, to have the OER indorsed by the AF/AXO. He doesn't state, however, that the finality of that decision was his alone. In contrast, DPMAJA finds it is only the applicant's personal opinion that it was not the "agency head" who had made that choice.

Regulatory guidance was that the AF/XO could have indorsed the OER himself, had it indorsed by his assistant, or returned it without action. That he ultimately decided not to sign the report is not an error or injustice.

Additionally, the applicant cites that statement as clear evidence the regulation was violated in the indorsement level decision in his case since it was determined by promotion eligibility rather than demonstrated job performance. The regulation specifically prohibits any numerical quotas or forced distribution of ratings. Even so, the applicant attempts to equate the optional final indorsement level with the term, "rating," and thus lead the AFBCMR to the conclusion that a senior officer's decision not to indorse a particular OER somehow constitutes a regulatory violation. If true, the inescapable conclusion would be that the most senior officer in a ratee's evaluation chain was somehow obligated to sign all reports rendered on officers under his or her command. Lastly, regardless of what the applicant has said about the indorsement level, it is not a rating. Ratings are those marks on the front and back side of an OER as an evaluation of an officer's

performance and performance-based promotion potential. All of the prohibitions concerning "quotas" or "forced distribution of ratings" do not apply to optional indorsement levels. Thus, applicant's arguments that the lack of an AF/XO indorsement somehow constitutes a regulatory violation are fundamentally flawed.

Regarding applicant's assertions relating to why he was nonselected are only his opinions. Violations, regulatory or technical, are not in evidence. The documentation provided does not constitute sufficient evidence to excuse those nonselections or provide a basis for direct promotion to lieutenant colonel.

In regard to applicant's allegations his records were incomplete or in error regarding his PME and flying hours, senior service school information has not been included in the OSB of majors being considered for promotion to lieutenant colonel since 1987 and beyond. While he completed AWC prior to the board, evidence of that fact would have been masked from his and every other major's OSB. On that basis, he was not treated unfairly. His 2000 plus flying hours are listed on the OSB, but improperly. He has not shown what actions, if any, were taken to effect a correction.

The checks and balances of the PRF process help to ensure that all eligibles receive equal opportunities for a DP rating. There is no evidence to show that applicant didn't. He would have been provided a copy of his PRFs approximately 30 days before each board. Had he determined there was a problem with the PRFs, or the recommendation provided, it has not been shown what action, if any, was taken to effect a correction prior to each of the respective boards. Those contemplating a change to an inaccurate PRF are required to use the criteria outlined in AFR **36-10** and the procedures outlined in AFR **31-11**. These procedures were developed because it would be next to impossible to duplicate the quality control process or competitive award process and scrutiny to which the PRF had been subjected to originally. Thus, the Air Force only requires certification from those involved in preparing the original PRF to effect the correction. As such, applicant's conclusion that correction of a PRF under AFR **31-11** is impossible, is clearly based only on his faulty premises-not on facts.

Lacking evidence to the contrary, DPMAJA believes the senior rater was totally familiar with the applicant's performance and performance-based potential and that he had an in-depth perspective of his accomplishments. Based on that knowledge, he assigned the Promote recommendation. In light of that same knowledge, he was the best qualified advocate to support the applicant at the MLEB for any possible aggregation or carryover DP allocations. DPMAJA found no evidence that, assuming an indorsement by the AF/XO to the 15 June 1988 OER, the senior rater would have provided a higher rating in the form of a DP.

DPMAJA noted applicant's discussion of how the general MLEB process is a violation of 10 USC, Section 611. Applicant's senior rater was a member of the MLEB which he faults and the one most familiar with his performance and performance-based potential. As a MLEB member, his senior rater would have represented him at that board. His officer selection record and the completed PRF would have been reviewed along with similar documents for all other officers assigned to that same senior rater for aggregation or carryover DP allocations. Failing to get a DP, he now questions the legality of this MLEB process but without proof of regulatory or technical violations. Consequently, all his arguments in this regard are deemed to be without merit. Nonetheless, the MLEB is not covered under 10 USC 611 and is not required to meet the selection board criteria outlined therein.

Regardless, the MLEB doesn't "preselect" officers for promotion- it simply reviews and evaluates the officer's record of performance (ROP) to provide performance-based differentiation to assist central selection boards in identifying who is best qualified for promotion, while ensuring officers receive equitable consideration in the promotion recommendation process. It also evaluates eligibles for aggregate and carryover DP allocations and identifies and discusses with appropriate senior raters those PRFs with recommendations which appear unsupported by members' ROP.

In reference to applicant's claims that the process of the central selection boards is not based on statutory requirements, DPMAJA believes it's important to reflect on comments by competent legal authority. "There is no provision of law which specifically requires each promotion board to personally review and score the record of each officer that is being considered by the board..." was noted by AF/JAG in its opinion addressing the participation of selection board membership in the selection process (copy attached).

The language in the above cited AF/JAG opinion denotes that panels are a type of administrative subdivision of selection boards. At the time the Defense Officer Personnel Management Act (DOPMA) was enacted, the Congress was aware of the existence of promotion board panels and their use as administrative subdivisions of promotion selection boards and had no problem with them. It was not the expectation of Congress that each board member would review each and every record considered by the board.

The Air Force has long used the panel concept in conducting selection boards based primarily on the stiff competition generated as a consequence of the number of eligibles. Such large numbers require an equal distribution of the quality spectrum of records among panels. Records are distributed to panels in an order based on the reverse order of the individual social security numbers. This is intended to ensure a random

distribution of quality at each panel. Even then, the concept has safeguards to ensure an equal distribution of the quality spectrum of records to each panel.

Each panel's task is to align the records assigned to it in an order of merit and break ties when the quota runs out at a score category that has more records in it than the quota allows to be promoted (commonly referred to as the gray zone). When a panel resolves its gray zone ties, it becomes aware of the lowest selects and the highest nonselects on its order of merit and must determine if the lowest select is fully qualified for promotion as is required by law.

The panel understands all records scoring higher on its order of merit than the lowest select are also selects. In essence, each member is required to certify that the corporate board has considered each record. This same logic applies to the follow-on requirement that each board member certify that, in his/her opinion, the recommended officers are the best qualified for promotion.

One of the major responsibilities of the board president is to review the orders of merit to ensure consistency of scoring and quality among the panels. There has never been a requirement for individual members to "carefully consider the record of each officer whose name was before them." Such a requirement is levied only on the corporate board by the specific language of Section 617c.

Applicant stated that a "secret" system called the "projected order of merit" (POM) system "plays a major role in the selection process." This is simply not a "secret" system. Board members were provided an explanation of its use as a management tool to assist the board president in his responsibility for quality review.

The POM is a computer-based statistical analysis that predicted, on the basis of past boards, how any given individual might be scored on the current board. If, in the board president's opinion, any record so identified appeared out of place, quality-wise, in comparison to other similarly scored records, he cbuld send it to another panel for a revote and independent evaluation.

As a result of this process, all the board president is doing is exercising his responsibility to ensure the scoring of records is accomplished equitably.

As to applicant's claims that board members never see a selection list, either from their panel or the board as a whole, before the "board" is complete, DPMAJA stated such a statement is true only in part, but that fact in and of itself is not considered a violation of 10 USC 617 as alleged. The specific language of section 617 speaks to the corporate board, not to individuals. There is no requirement for each and every individual member to

carefully consider the record of each and every eligible. This requirement is on the corporate board.

The applicant claims he should now receive a direct promotion to lieutenant colonel on the premise he has been denied "fair and equitable considerations" and an SSB is unable to resolve his plight. The reasoning he provides for his nonselections constitutes mere conjecture on his part since the exact reasons for a selection or nonselection are usually not readily apparent. By law, selections must be based on a "best qualified" basis after applying the complete promotion criteria. This results in extremely keen competition among the eligibles but, because of Congressional constraints, not all can be selected.

The complete evaluation is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Applicant reiterated the contentions contained in his initial appeal. He disagreed with the advisory opinion and offered comments addressing specific issues in the advisory opinion.

Applicant provided statements from the rater and additional rater on the report in question as evidence that the report was prepared using rules which specifically violated AFR 36-10. He stated, as such, this report is clearly flawed and correction must be made. Therefore, he requests the board correct the report to reflect AF/XO indorsement.

Regarding the OER, applicant stated the evidence gleaned from his additional rater, which states this report was rendered in violation of regulation, proves this report should be corrected completely or at minimum should be removed from his file. Review of the "spin off" issue and evidence surrounding the PRF itself (to include the process) also provides clear and convincing proof of error or injustice. Although AFMPC would have the board apply a legally impermissible standard of review of this evidence, the evidence is indeed compelling and clearly provides substantial proof of error and injustice. Therefore, request the board correct the injustice in his record and upgrade the PRF to a "DP."

As to the Air Force selection board procedures, applicant stated the evidence, particularly the evidence not disputed by AFMPC, clearly shows the "plain language" of statute, directive and regulation were violated by Air Force conduct of the selection boards that considered his record. For these reasons, request the Board remove and/or set aside the unjust nonselections he received by the selection boards that considered his record.

Regarding the promotion denied him due to defective records and defective board proceedings, he believes the evidence is again

clear, that without the aberrations in record and proceedings, he would have been promoted by these selection boards. He further believes the evidence is clear an SSB cannot provide him full and fitting relief both due to the error(s) in record, but also due to the error(s) in procedures of the original board (compounded by the arbitrary and capricious scoring procedures used by SSBs). Therefore, he requests the AFBCMR correct his record to reflect selection for promotion to lieutenant colonel in the promotion zone.

Applicant provided additional comments with respect to the timeliness of his appeal.

Applicant's 24-page response, with attachments, is at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION:

The Evaluation Procedures Section, AFMPC/DPMAJEP, reviewed this application and recommended denial, stating the applicant has not provided substantiated proof of the allegation that he was illegally denied the AF/XO indorsement. The lack of an AF/XO indorsement is not a violation of regulatory provisions or action that would cause the OER to be flawed. In accordance with AFR 36-10, para 2-23a(2), DPMAJEP found no illegal action in which the AF/XO took to deny the applicant an AF/XO indorsement. (Exhibit F)

The Senior Attorney-Advisor, AFMCP/JA, reviewed this application and recommended it be time-barred under the traditional rules found in 10 USC 1552 and AFR 31-3, and that it is also stale under the doctrine of laches. Their comments, in part, follow.

Applicant first maintains that his OER was "closed out" below AF/XO (three star) level by the wrong individual; i.e., by regulation, only the AF/XO himself, as the agency *head,* could determine whether to indorse the report or send the report back without action (AFR 36-10, para 2-23a(2)). Applicant relies for this conclusion on the statement in the letter from Major General W--- [the senior rater] that "I made the decision, finally, to have your OER closed out by the AXO." In JA's opinion, applicant has both misinterpreted the cited paragraph and misstated the facts relevant to the situation. The subparagraph cited above is one of several *examples* illustrating the point of the main paragraph that rating chains are flexible and can be modified to fit the needs of the particular unit. The subparagraph cited above represents but an example "where this flexibility *may* be exercised" (emphasis added). It certainly does not constitute a binding requirement. In any case, JA agrees with DPMAJEP (Exhibit F) that the evidence submitted by applicant does not even prove a deviation from the structure contemplated by the subparagraph. The additional rater's letter included in applicant's package states that when he talked with AF/XOO about

the applicant's OER, the latter concurred with his recommendation for an AF/XO indorsement "and indicated he would discuss this with General D---." Consequently, it is JA's opinion that the greater weight of evidence available indicates that the staff agency head (AF/XO), at a minimum, was consulted, and that he concurred in the action taken by AF/XOO.

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> (2) A report is sent to a wing commander or a headquarters staff agency head for endorsement. The wing commander or staff agency head may indorse the report, have their vice commander or deputy indorse the report, send the report back without action allowing the previous evaluator to be the final indorser ....

In JA's opinion, applicant has both misinterpreted this paragraph and misstated the facts relevant to the situation. The subparagraph quoted above is one of several examples illustrating the point of the main paragraph that rating chains are flexible and can be modified to fit the needs of the particular unit. The subparagraph quoted above represents but an example "where this flexibility may be exercised" (emphasis added). It certainly does not constitute a binding requirement. In any case, JA agrees with DPMAJEP that the evidence submitted by applicant does not even prove a deviation from the structure contemplated by the subparagraph. The additional rater's letter included in applicant's package states that when he talked with AF/XOO about the applicant's OER, the latter concurred with his recommendation for an AF/XO endorsement "and indicated he would discuss this with General D---." Consequently, it is JA's opinion that the greater weight of evidence available indicates that the staff agency head here (AF/XO), at a minimum, was consulted, and that he concurred in the action taken by AF/XOO.

Applicant next contends that "promotion eligibility" was improperly used as a criterion to deny applicant an AF/XO endorsement for his OER. He cites the former XOO's statement that the "guidance we were working with prior to the new system coming in was to throttle back and use the three and four star signatures for fast burners and 'saves' only," as proof that promotion eligibility formed the basis for the decision to change the endorsement level for his own OER from that recommended by his immediate supervisors. He neglected to quote the next sentence from the former XOO's letter that "we had not gotten that 'pure' at the time your (applicant's) OER was prepared, but

we were well on our way." In truth, applicant has provided no convincing evidence that his OER was denied an endorsement in favor of anyone less deserving. The other letters solicited by applicant suggest that a cutback in the number of top level endorsements began to occur, but more along the lines of the soon-to-be-implemented OES; there are no indications that in-the-zone candidates were being sacrificed to accommodate either APZ or BPZ numbers. Thus, such action would not violate AFR 36-10, Atch 1, para 6d (formerly para 1-7b, but redesignated by IMC 84-2), cited by the applicant. And the reported XO policy to constrain the issuance of the highest endorsement levels did not, in **JA's** opinion, violate any other provisions of the regulation either. The evidence offered by applicant does not prove the establishment of any quotas or rating distributions within XO that would have violated para 3-le of the regulation. Finally, JA noted that although the applicant's rater and additional rater may have desired an AF/XO endorsement for applicant-having "targeted" or "forecasted" such a result-that recommendation, in the end, was obviously not adopted by those responsible for the decision. The disappointment that would naturally follow such a result, however, does not equate to error or injustice.

Having found no error occurred with regard to applicant's 1988 OER, JA likewise discerned no error in the applicant's Promotion Recommendation Forms (PRFS) that followed. Even if one were to assume arguendo that applicant's challenged OER contained an erroneous promotion endorsement, it would not follow that applicant's failure to subsequently receive a "definitely promote" (DP) PRF was based on that OER endorsement. Such an argument constitutes speculation at best.

Noting applicant's arguments concerning the PRF appeal process, JA stated the senior rater is clearly an inextricable part of any PRF appeal process because a PRF has no effect or existence without the senior rater-the PRF's author. The regulation does not require the senior rater to compare the applicant's revised PRF with other records; rather, that individual is the person who must verify the inaccuracy of the original form and the accuracy of any proposed correction. Again, that must be an absolute prerequisite to correction as the form cannot exist without the senior rater. The MLEB President, on the other hand, is required by regulation to "certify that compared to other records reviewed during the evaluation process, your record would have been competitive for the revised PRF assessment if the circumstances which caused the original PRF assessment had not existed." It is true that records of performance are not necessarily maintained so as to be available to an MLEB president who might be asked to make such a comparison. JA disagrees with the applicant, however, that this fact renders a meaningful comparison impossible. In their view, the regulation provision does not prescribe a literal requirement to compare actual record of performance files. Rather, it is a requirement that the MLEB president, utilizing the maturity and experience that goes with this position, compare an applicant's record against the general

standard by which records of performance in that particular organization at that time would have qualified for an upwardly revised recommendation. While they would never hold an MLEB president to a requirement to remember every record considered by a previous board, they do not believe it to be impossible or unreasonable to expect that an MLEB president will be able to recall and identify the general standard of excellence that records falling into a particular category (e.g., "Definitely promote") met or represented at that time. This is the comparison that is called for in the regulation, and they believe it to be a reasonable requirement to support a change in the promotion recommendation.

Applicant is also confused and incorrect as to his conclusions that the AFR 31-11 requirement exceeds the standard of proof required by 10 U.S.C. 1552 and is illegal. First, he misconstrues the meanings of the two standards of proof he cites when he states that the requirement for senior rater or MLEB president statements "clearly exceed (sic) the standard of proof required by 10 U.S.C. 1552; i.e., a preponderance of evidence, not substantial proof." In the first place, 10 U.S.C. 1552 does not itself provide any standard for proving an error or injustice. The case law, however, makes clear that a request for correction must be supported by substantial evidence (not preponderance of the evidence). *See e.g.*, *Blackwell* ***v. Marsh,*** *D.C.* GA. 574 F.Supp. 210 (1982); *Sanders* ***v.*** *United States,* 594 F.2d 804, 812 (1978). After citing the definition of "substantial evidence" according to Black's **Law** Dictionary, JA stated the standard to support an action pursuant to either AFR 31-3 or AFR 31-11 is not improper or unreasonably onerous. On the contrary, it gives an applicant the benefit of any doubt.

Applicant argues further, however, that the standard of proof required to specifically change a PRF constitutes a "but for" test "declared in *Sanders* v. *U.S.* as inappropriate for service correction boards." At the outset, applicant offers no citation to the case cited. JA presumes he is relying upon *Sanders* v. *U.S.,* 594 F.2d 804, 219 Ct.Cl. 285 (1979), a case cited above and which has been cited to the BCMR on numerous occasions for various propositions, and which indeed discusses the use of a "but for" test by correction boards. Applicant's reliance on the court's conclusion in this case, however, is totally misplaced. In a superficial and erroneous treatment of the issue taken out of context, he seeks to apply a court's conclusion made as to a Correction Board's treatment of an acknowledged error(s) in the promotion board process and apply it to determinations of promotion *recommendations* (in the first instance) and appeals of those PRFs within an internal Air Force appeals process (in the second). In *Sanders,* the problem was one of remedy-whether *admittedly erroneous* OERs contributed to nonselection and the officer's ultimate separation. The Court rejected the BCMR's test that an applicant must show he would have been selected for promotion "but for" the erroneous report(s), and that the regulations require only a showing of "probable material error or

injustice." In *Sanders,* the court said the real error was that the *BCMR* acted as a "super promotion board" rather than correcting the error, effectively usurping the function of a promotion board. In applicant's case, we are not dealing with a standard to be applied in obtaining correction board relief, nor are we talking about the effect of an *acknowledged* error on the promotion process. On the contrary, the issue here is *whether* any error has occurred within an internal Air Force promotion *recommendation* procedure (unlike *Sanders,* applicant has not proven the existence of any error requiring correction), wherein, as noted above, by design, the final promotion recommendation (DP, P, DNP) cannot exist without the concurrehce of the officers who authored and approved it. In short, the Court's analysis in *Sanders* simply does not apply to this situation.

Finally, JA urges the AFBCMR to adopt the Air Force regulatory requirements for assessing any correction to a PRF. First, to do so would recognize that the award of a PRF is part of an evaluation process that is a totally internal ***Air Force*** administrative procedure which is not governed by statute or DOD Directive. As such, the Air Force, through its regulations, is in the best position to define the policy and requirements applicable to the system. Second, as alluded to above, due to the necessarily subjective nature of the PRF, the BCMR has no objective criteria upon which it could determine the appropriateness of a recommendation. Indeed, because determination of an ultimate recommendation depends upon the personal knowledge of the individuals in the PRF process and not upon retained records, JA believes the BCMR is not in the position to independently determine a promotion recommendation; reliance on the senior rater and MLEB president per the regulation is the best and only practical means to permit a PRF correction.

Applicant next claims that the PRF process is contrary to statute because the MLEB acts as a de facto promotion board. In drawing that conclusion, applicant relies upon statistics that show that close to 100% of the officers who have received definitely promote (DP) promotion recommendations have been selected for promotion. He maintains that these quotas effectively "fill" two-thirds of the promotion quota through the award of DPs. 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. Moreover, the OES program fully comports with the law and governing regulations. Officers receiving DPs are indeed those whom the system has identified as having the greatest promotion potential. When the officer evaluation system was developed, the Air Force expected a high correlation (approaching 100%) between "DPs" and promotion selection because of the emphasis placed on performance. Consequently, those receiving DP recommendations should be ***the*** most qualified officers for promotion at the central promotion board.

The officer evaluation system 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. 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 **JA's** view, totally unsubstantiated. Senior raters, MLEBs, and "aggregate" boards are all part of the Air Force's evaluation system designed once again 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. The AFBCMR should not, in the absence of proof, entertain such a notion. It is an axiomatic principle of administrative law that federal officials charged with official duties are presumed to carry out those responsibilities according to law; i.e., a presumption of regularity, in the absence of proof to the contrary. See ***Sanders v. U.S., supra,*** at 302 (1979). That the Air Force has devised an additional tool (the PRF) to assist in differentiating officers' performance and potential in no way alters the selection boards' statutory obligation with respect to reviewing records in the selection process. 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 presumes that selection boards have followed their instructions and performed their duties in the prescribed manner.

Contrary to the applicant's implications, an MLEB does not determine who will receive particular promotion recommendations. Rather, the MLEB determines only DP allocations. An officer's senior rater still must apply the allocations and ultimately decide which officers receive which recommendations or are submitted for "aggregation" (see AFR 36-10, Chap 4).

Applicant's argument that MLEBs are flawed because they fail to incorporate the safeguards required for Section 611(a) boards is totally without merit. Indeed, promotion selection boards *are* controlled by Title 10. On the other hand, MLEBs are part of the Air Force's internal *evaluation* system, one of the key purposes of which is "to provide selection boards with sound information to assist them in selecting the best qualified officers'' (AFR 36-10, para 1-2). It is *not part* of the promotion selection process itself. 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.

Applicant avers that promotion selection boards in the Air Force are contrary to Air Force regulation, DOD Directives and statute. He begins with an argument that Air Force promotion boards violate 10 U.S.C. **616** and **617.** 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 USC 616 or the resulting certification required by 10 U.S.C. **617.** 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. 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 them. Furthermore, the language of 10 U.S.C. ***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 personnel files to panels and procedures to insure that the range of scores each panel reports are 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.

Notwithstanding this analysis above, applicant ***continues*** to maintain that the requirements of statute cannot be met by Air Force selection board procedures. He insists that only some other methodology could provide the requisite compliance. Specifically, he refuses to acknowledge that panels-as used by the Air Force-can legally coexist with the provisions of sections 616 and 617. As he has stated over and over again, both of those sections require that members be recommended for promotion by a ***majority*** of **the members** of *the* **board.** The Air Force process, as described above, meets this requirement. The report of the selection board, signed by all of the voting members of the board, constitutes the required recommendation. While JA agrees that the Air Force methodology differs from the other services and that it might seem unorthodox, being different and unique does not make it illegal. The bottom line is that it *does* meet

the statutory mandates. And the applicant has failed to prove otherwise.

Applicant's reliance as to the supposed condemnation of Air Force promotion procedures by the Senate Armed Services Committee is just plain wrong. He has chosen to ignore in his discussion the Committee's specific findings that "[t]he OSD review did not find ... systemic problems with respect to selection for grades 0-6 and below ...." Senate Armed Services Committee, 102d Cong., 1st Sess., *The Conduct of Proceedings for the Selection of Officers for Promotion in The U.S. Air Force*, S.Rep. No. 102-54, p.15.

Applicant also contends that the failure of the Air Force to implement for field grade promotion boards DOD Directives regarding the role of the board president until 1992 "had a deleterious affect (sic) on the promotion boards which considered me for lieutenant colonel." This is clearly erroneous; the Air Force was in compliance with the referenced DOD requirements. Nor can the applicant show how the failure of the Air Force to revise its regulation until 1992 might have specifically prejudiced him. The applicant has offered no proof that the presidents of *any* Air Force selection boards acted contrary to law or regulation. In fact, none of the duties prescribed for board presidents in the Air Force system involve any actions that would improperly constrain the board as suggested by the applicant.

As to his next argument regarding reliance by the selection board on a computer "Tilt" model (the POM), applicant has offered absolutely no evidence to support his theory, nor has he established any evidence of any wrongdoing by anyone, and he certainly has made no showing of how he might have personally been prejudiced by the alleged conduct. AFMPC has previously acknowledged that computerized products were sometimes used in the past as a management tool to assist the board president in performing his responsibility to insure consistency in scoring among panels. The decision to recommend or not recommend individuals for promotion, however, has always been one of the promotion board members; such decisions were never subordinated to a computer model.

In JA's opinion, applicant's argument 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 1320.9 (later replaced by 1320.12) 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, as a practical matter, the panels *operate* as separate boards for purposes of the DOD Directive. More importantly, they **fulfill** all the requisite statutory and regulatory requirements.

Noting applicant's claims that his nonselection cannot be remedied by special selection board (SSB) consideration, JA stated 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 Eor 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. (See 10 USC 628(b) and DOD Directive 1320.11, para D.I.) Air Force policy mirrors that (AFR 36-89, para 33a).

The complete evaluation is at Exhibit G.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

Counsel took exception to comments contained in the AFMPC/JA advisory and provided comments addressing what he believes were unwarranted and inappropriate comments.

Counsel's 13-page response, with attachment, is at Exhibit I.

In his response, applicant provided comments addressing the timeliness of his appeal and requested that the AFBCMR consider his case based on merits and not reject the petition based upon the faulty advise of AFMPC/JA.

As stated in his initial petition and rebuttal, he had over 2,000 flying hours which were never reflected on his brief or at the MLEB (at MLEBs before 1992, TAC illegally provided MLEBs with flying hours) which was not reflected in his record. The AFMPC opinions contain no further comments on this issue.

In the summary section of his response, applicant asks the Board to consider the evidence presented in his position. He believes the evidence proves the contested OER was prepared in direct violation of AFR 36-10. Specifically, the indorsement level of the report was limited by an illegal indorsement quota. The basis for determining the level of indorsement on this report was illegal consideration of promotion eligibility, and the agency head, AF/XO, was denied the opportunity to even review this report as required by regulation. The evidence proves this

tainted report later flawed his record of performance used in the promotion recommendation process and later at the central promotion board. To correct this error completely, he requests that the board upgrade the indorsement level of this report to reflect AF/XO indorsement - the indorsement level recommended by his rater and additional rater and only denied illegally by his director, Major General W---, whose indorsement decision was clearly based upon considerations prohibited by AFR 36-10.

The evidence also proves both the management boards and central promotion boards which considered his file were in violation of statute and directive. As a result of these errors, he was systematically denied the due process required by statute and directive. These violations of law and directive (coupled with unjust procedures used within the SSB process itself) preclude any relook board from providing him full and fitting relief. Therefore, he asks the board to grant a full measure of relief and correct his record to reflect selection for lieutenant colonel as if selected in the promotion zone by the CY89 lieutenant colonel board, to include restoration of all rank, benefits, entitlements, and other relief appropriate to provide him full and fitting relief consistent with law.

Applicant's 19-page 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 OER and PRF were rendered in error or are unjust. Applicant's contentions are duly noted; however, in our opinion, the detailed comments provided by the appropriate Air Force offices more than adequately address these issues. We find the applicant's assertions, in and by themselves, are not sufficiently persuasive to override the rationale provided by the Air Force. Therefore, we agree with the recommendation 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 A. DD Form 149, dated 16 Oct 92.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, AFMPC/DPMAJA, dated 30 Apr 93.
Exhibit D. Letter, AFBCMR, dated 27 May 93.
Exhibit E. Applicant's Response, dated 12 Sep 93, w/atchs.

Charles E Bennett

CHARLES E. BENNETT
Panel Chair