FEB 09 1998

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION **OF** MILITARY RECORDS

IN THE MATTER **OF:** [redacted]

DOCKET NUMBER: 96-02926

COUNSEL: [redacted]

HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

His nonselections for promotion to colonel be set aside.

He be reinstated to active duty retroactive to 30 September 1993, the day before his retirement date, with restoration of back pay and benefits.

APPLICANT CONTENDS THAT:

The CY91 Colonel Board and the CY93 Lieutenant Colonel Selective Early Retirement Board (SERB) were conducted in violation of governing statutes, directives and instructions. His selection for early retirement should not have occurred.

His selection for selective early retirement was illegal because his nonselection for promotion that made him eligible for the SERB was illegal.

In support of his request, applicant submits a 15-page Brief by counsel, with additional documents associated with the issues cited in his contentions (Exhibit A).

STATEMENT OF FACTS:

On 7 June 1970, the applicant was appointed a second lieutenant, Reserve of the Air Force, and was voluntarily ordered to extended active duty on 15 October 1970. He was integrated into the Regular Air Force on 9 August 1978 and was progressively promoted to the grade of lieutenant colonel, effective and with a date of rank of 1 March 1987.

Applicant was considered and nonselected for promotion to the grade of colonel by the CY 1991B (9 September 1991) and CY 1992A (6 July 1992) Central Colonel Boards. As a result of not being promoted by the colonel boards, applicant was considered and not selected for early retirement by the CY 1993 Lieutenant Colonel Selective Early Retirement Board (SERB), which convened on 20 January 1993.

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

| | Period Ending | Evaluation |
|---|---|---|
| | 5 May 87 | 1-1-1 |
| | 5 Apr 88 | 1-1-1 |
| | 5 Apr 89 | Meets Standards (MS) |
| | 5 Apr 90 | **MS** |
| # | 5 Apr 91 | **MS** |
| ## | 5 Apr 92 | **MS** |

# Top report at the time he was considered and nonselected for promotion to colonel by the CY91B Central Colonel Board, which convened on 9 September 1991.

## Top report at the time he was considered and nonselected for promotion to colonel by the CY92A Central Colonel Board, which convened on 6 July 1992.

On 30 September 1993, the applicant was relieved from active duty and retired effective 1 October 1993 in the grade of lieutenant colonel, under the provisions of AFR 35-7 (voluntary retirement for years of service established by law). He served a total of 22 years, **11** months and 16 days of active service for retirement and 23 years, *3* months and 24 days of service for basic pay.

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AIR FORCE **EVALUATION**:

The Directorate of Personnel Program Management, HQ AFMPC/DPPB, reviewed this application and stated that they disagree with counsel's contention that the applicant's selection boards were in violation of Sections 616 and 617, 10 U.S.C. DPPB indicated that Air Force legal representatives have reviewed their procedures on several occasions during the past few years and have determined those procedures comply with applicable statutes and policy.

As to counsel's attempt to discredit the scoring scale used by the Air Force, DPPB indicated that the scoring scale is from 6 to 10 in half point increments. Board members are briefed to try to apply a 7.5 score to an "average" record and to try to use the entire scoring range throughout the evaluation process. Recognizing that the scoring of records is a subjective process, individuals may have a slightly different definition of what constitutes an "average" record. DPPB stated that as long as each board member applies their individual standard consistently throughout the scoring process, each consideree will get a fair and equitable evaluation.

With regard to counsel's assertion that the post-board action of preparing an alpha select list of the board's recommendations constitutes some illegal action and voids the entire board, DPPB

stated that the alpha select list is merely a recapitulation of the selects off of the board's orders of merit in alpha sequence vice numerical sequence.

DPPB noted that counsel implied that another post-board function-preparing the final board report for presentation to the approving authority - was the reason applicant was not selected for promotion. DPPB stated that DoD Directive **1320.09** directed separate promotion boards be conducted and also authorized conducting those separate boards concurrently. The directive also authorized consolidating the results of the boards into a single package for presentation to the approving authority. DPPB indicated that this has been done for many years without challenge or objection by Air Force legal representatives. Title 10, U.S.C., Section **621,** states that officers in the same competitive category shall compete among themselves for promotion. DPPB stated that is exactly what happens on Air Force promotion boards. The applicant competed only against other line officers.

DPPB disagrees with counsel's contention that the board president's role violates DoDD restrictions. DPPB stated that the actions/responsibilities of each board president are in compliance with applicable directives and policy.

DPPB indicated that counsel's statements concerning Air Force SERBs employing the panel concept in which the majority of the records of the SERB candidates were considered by only one panel are incorrect or misleading. DPPB stated that when more than one panel scored a competitive category on a SERB, each panel had an equal share of the records, i.e., if there were two panels, then each would have approximately 50 percent. The Air Force concedes that one panel may have as much as 51 percent and the other panel have as little as 49 percent since one of the two panels has to be the recipient of the last block of 20 records. It that is what counsel means when he states "the majority of the records of the SERB candidates were considered by only one panel," then DPPB poses no objection. DPPB indicated that counsel's statement "The board only reviewed those few records at the cut-off point" is incorrect. The quota for the SERB in question was 30 percent of the eligibles. After panel 1 scored their half of the records and an order of merit was finalized, the bottom 40 percent of that order of merit was moved to panel 2 for their scoring. Likewise, the bottom 40 percent of panel 2 was moved to panel 1 for their scoring. The end result was an order of merit by all board members for the bottom 40 percent. The quota was then applied against that order of merit and the individuals selected for retirement were identified. The conversion from a numerical order of merit to an alpha select list was completed post-board, just like a promotion board.

DPPB indicated that counsel is incorrect in his assertion that "the illegal process used at original promotion boards did not allow board members to form the required consensus to take away

the BPZ promotions from the I/APZ quota." After the BPZ order of merit was finalized, the record of the lowest possible BPZ select was reviewed by every board member that scored the line competitive category. The BPZ record was compared to the number one I/APZ nonselect **of** each panel to determine if the quality of the BPZ record was better than that of the number one 1 I/APZ nonselects. The promotion boards **in** question found the BPZ record better each time and the full BPZ quota was used. Therefore, counsel's claim that the SSB process is faulty because the central boards were illegal is without merit.

A complete copy **of** this evaluation is appended at Exhibit **C.**

The Staff Judge Advocate, **HQ** AFPC/JA, reviewed this application and recommended the application be denied. JA stated that counsel argues that promotion board panels do not act as the single "board" required by 10 U.S.C., 611(a), and that they instead 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** or the resulting certification required by **10** U.S.C. **617.** As noted previously, 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. JA indicated that, in essence, a majority of the board must recommend an officer for promotion and each member is required to certify that the corporate board has considered each record, and that the board members, in their opinion, have recommended those officers who "are best qualified for promotion." The members are not required to reach this point through an individual examination of every record, although they may do so. Rather, based on their overall participation in the board's deliberations, and the fact that the process involves the random assignment of officer selection records to panels to achieve relatively equal quality and procedures to insure that the quality of the records of those officers recommended for selection among the panels is essentially identical, the members are in a position to honestly certify that the process in which they participated properly identified, based on the record before them, those officers who were best qualified for promotion. In JA's opinion, that is enough to assure compliance with all the statutory requirements. Notwithstanding the opinion cited by applicant in Roane v. U.S., another judge from the United States Court of Federal Claims has held contra, determining that the Air Force's promotion system fully complies with the law (see Small v. U.S.).

JA provided the relevant portion of the DoD Directive **1320.9** (later DoDD 1320.12) concerning counsel's allegation that the Air Force violated DoD Directive **1320.09** by convening panels and not separate promotion boards to consider the various competitive categories.

**JA** indicated that counsel 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 ensure that these officers compete only against others in the same competitive category--to assure fairness and compliance with Title **10,** Chapter 36. JA stated that 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.

JA disagrees with counsel's assertions that the board president's duties violate DoD Directive **1320.12.** JA stated that the duties prescribed for board presidents by Air Force directives **do** require the president to perform several critical duties relative to board scoring. Those duties do not, however, in any manner, constrain the board from recommending for promotion the best qualified among the fully qualified officers being considered. Counsel 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 counsel claims the SERB that selected the applicant was "illegal." JA stated that counsel is incorrect in his statement that "SERBs are conduced using the same selection boards as promotion boards (10 U.S.C. 611)." SERBs are conducted under 10 U.S.C 611(b), whereas promotion boards are governed by 10 U.S.C. 611(a). Consequently, counsel's arguments concerning violations of Sections 616 and 617 of Title 10 are inapplicable, as they apply only to **10. U.S.C.** 611(a) promotion boards. Counsel also contends that the SERB consisted of two panels that operated autonomously, thereby precluding compliance with the statutory requirement for action by "the board" as a whole. JA stated that this argument is both factually and analytically wrong. Counsel is wrong that the two SERB panels acted autonomously. As verified by DPPB, the procedure used in the SERB included a swap between the two panels of the records of those officers preliminarily identified for selection. This process insured that **all** board members were in agreement that those officers selected for early retirement were the correct ones according to the law and the Secretary's instructions.

As to the contention that a Special Selection Board **(SSB)** would first require applicant's reinstatement to active duty, citing Doyle v. United States, **599** F.2d **984 (1979)** and DoD Directive **1320.11**. JA stated that Doyle is inapplicable, as it predates the Defense Officer Personnel Management Act (DOPMA) and the statutorily prescribed remedy provided by DOPMA -- the SSB. Further, in JA's opinion, an officer, who has been separated or retired, can be afforded SSB consideration without placing the officer back on the active duty list. Such authority is clearly provided the Secretary of the Air Force under Section **628** of Title **10, U.S.C.** This conclusion is firmly supported by the legislative history of the section, H.R. Rep No. **1462,** 96th Congress, 2d Session **(1980).** In the context of the statutory scheme, the term "officer" applies **to** the status of the individual at the time of the original promotion consideration when the error or injustice occurred. JA indicated that the status of the individual at the time of the **SSB** does not govern, but rather, the status at the time of the error which led to the improper consideration at the original promotion board---when, of necessity, the individual would have been on active duty. JA stated that the Secretary **of** the Air Force clearly has the independent statutory authority pursuant to 10 U.S.C. **8013** to convene an SSB to consider an officer who is not currently on the active duty list. **JA** indicated that DoDD 1320.11 does not prohibit the use of SSBs to consider separated officers who were on the active duty list at the time they were originally considered for promotion.

In summary, **JA** stated that the applicant has failed to present relevant evidence proving the existence of any error or injustice prejudicial to his substantial rights with respect to his promotion nonselection or his selection for early retirement by the SERB. Consequently, **JA** recommended that the application be denied.

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

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APPLICANT'S REVIEW OF AIR FORCE **EVALUATION:**

Counsel reviewed the advisory opinions and indicated that the main problem with the advisory opinions is their utter lack of supporting evidence. Counsel stated that during the course of litigation in Roane v. United States, 36 Fed. Cl. 168 (1996), the Air Force represented that no documentation of Air Force promotion board procedures existed, and that some (particularly that pertaining to the Projected Order of Merit [POM]) had been destroyed. In AFBCMR Docket No. 91-01524, the applicant, Major L. W. N---, had alleged that promotion board members were totally ignorant of the POM and the role it played in the promotion process. An AFMPC advisory opinion represented just the opposite, deriding Major N---'s allegations. Absent any documentary evidence of promotion board procedures, Major N---

was unable to challenge the accuracy of the advisory opinion and the AFBCMR accepted the advisory opinions' representations as true in denying relief. In the federal court litigation of another related case, however, the applicant was able to depose Brigadier General **H. J. I---**, Chief of the Promotion Secretariat, at the relevant time. Gen **I---** confirmed that Major **N---** had been right all along about the secrecy of the POM. Counsel stated that the author of the DPPB advisory opinion in this case confirms the same lack of evidence of SERB procedures. The "essence of those procedures," as represented in the advisory opinion, has obviously come from somewhere. But no documentation exists and there is no suggestion that the advisory opinion author is testifying from his own personal knowledge of the **SERB** procedures that were used nine years ago. Under these circumstances, the advisory opinion can amount to no more than either a summarization of what someone else told the author or the author's own idle speculation.

Counsel stated that the advisory opinions do not dispute that **10** U.S.C. Sections 616 and 617 require consensus among "a majority of the members of the board" about the officers to be recommended for promotion. Nor do they dispute that the records of eligible officers were divided among a number of autonomous panels for their independent review and that each panel "recommended" officers from among those that were distributed to it, without any record being considered by "a majority of the members of the board." The advisory opinions maintain, however, that majority consensus is reached after-the-fact when the members "certify" the board report on the basis of their "overall participation in the board's deliberations" rather than on their actual consideration of the recommended officers' records. Counsel indicated that promotion board members do not know the "material facts" because they are never told which officers are being recommended. Nor can they act on the basis of their "overall participation in the board's deliberations" because they are kept intentionally unaware of the POM and the role it placed in those officers being so identified. The members' unknowing signature of a blank piece of paper cannot retroactively satisfy the requirements of 10 U.S.C. Sections 616 and 617 that officers be found "fully qualified" and recommended as "best qualified" by "a majority of the members of the board."

Counsel stated that nothing in DPPB's explanation of the scoring process will change the mathematical reality that that process precludes the majority "consensuses" demanded by Section 616 and 617. Because there is no majority consensus regarding how the candidates are ranked on the OOM, a vote to determine whether the highest-scoring nonselect candidate is "fully qualified" does not translate into a majority consensus that every candidate ranked higher on the OOM is also "fully qualified."

Counsel stated that neither advisory opinion addressed the applicant's claim that the Air Force promotion process violates the requirement that eligible officers receive centralized

review. Counsel indicated that Air Force line officers are considered by one of a number of autonomous panels, with no centralization in the process and their fate often depending on which panel happened to review their record. DoDD 1320.9 requires each separate promotion board, even if all were held concurrently, to submit a separate report that is signed and certified by the members of that board. Counsel stated this does not happen in the Air Force. Members of both line and nonline boards sign a singular board record, purporting to certify officers in various competitive categories who few played any role in "recommending." As a result, DoD, the President, the United States Senate, and others who rely on board reports are given a false impression about the size of the board, its composition, and the reliability of the recommendations purportedly being made.

As to the SERB procedures, Counsel directed attention to the lack of any support that both panels considered the records of those officers who were recommended for early retirement. Counsel stated even accepting that representation as true, it confirms the applicant's claim that the SERB was conducted in violation of the Secretary's written instructions on the subject. According to the advisory opinions' description of the process, the only consensus reached by "a majority of the members of the board" pertained to the members who were recommended for separation. Counsel indicated that the SERB approached its task backwards. Even if "all of the board members saw and scored the records of every officer selected for early retirement," there was no majority consensus on what the Secretary was interested in - the qualifications of the officers recommended for retention.

With regard to Special Selection Board (SSB) eligibility, Counsel stated that the applicant's position is based on DoDD 1320.9, paragraph B2, which states in no uncertain terms that only "officers on the Active Duty List" are eligible for SSB consideration. Notwithstanding JA's strained interpretation of "the statutory scheme" to reach the opposite conclusion, the applicant's position is consistent with 10 U.S.C., Section 628's use of the word "officer" rather than "former officer" and with the title of Chapter 36 of which Section 628 is a part - "Promotion, Separation, and Involuntary Retirement of Officers on the Active Duty List." More to the point, it is consistent with Congress' stated intent in Section 14502. Counsel stated that JA's suggestion to read Section 628 as if it were written like Section 14502 would override a distinction that Congress specifically intended. Counsel indicated that the applicant's position is well-founded in the law.

Counsel indicated that for all the reasons stated in this appeal, the applicant should be granted the full relief sought.

Counsel's complete response is attached at Exhibit F.

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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 unpersuaded that the applicant has been the victim of either an error or an injustice. Evidence has not been provided which would lead us to believe that the applicant's consideration for promotion to the grade of colonel by the Calendar Year (CY) 1991B selection board was contrary to the pertinent provisions of the governing regulation, which implement the law. The applicant asserts that his consideration for promotion was contrary to the provisions of 10 USC, Sections 616 and 617. This issue has been thoroughly explored in the advisory opinion prepared for review by military legal authority and we agree with their assessment of this case. The applicant has provided no evidence which successfully disputes the JA interpretation of law or showing that he was inequitably treated when compared to other similarly situated officers. Furthermore, we have seen no evidence indicating that the applicant's selection record was erroneously constituted at the time he was considered for promotion by the CY 1991B selection board. Additionally, applicant's contentions concerning the statutory compliance of Selective Early Retirement Boards (SERBs) and the legality of the Special Selection Board (SSB) process, in our opinion, have no merit. The detailed comments provided by the respective Air Force offices adequately address these issues. 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 an injustice warranting favorable action on 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.

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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.

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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

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 23 Sep 96, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, HQ AFPC/DPPB, dated 9 Apr 97.
Exhibit D. Letter, HQ AFPC/JA, dated 20 May 97
Exhibit E. Letter, SAF/MIBR, dated 2 Jun 97.
Exhibit F. Letter from counsel, dated 18 Aug 97, w/atchs.

CHARLES E. BENNETT
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Panel Chairman