

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 94-03905

COUNSEL: Controlled Equity, INC.

HEARING DESIRED: Yes

NOV 06 1995

APPLICANT REQUESTS THAT:

1. Set aside all non-selections for promotion that he received.
2. His record be corrected to reflect continuous active service until the first day of the month following the Board's decision.
3. He receive back pay and other entitlements as appropriate for the period he was not on active duty until reinstatement.
4. His record be corrected to reflect the award and/or adjustment of his retirement pay as appropriate to reflect the additional continuous active service.

APPLICANT CONTENDS THAT:

The Air Force knew that a system of controlled ratings was operating illegally and inequitably. The Air Force elected to retain the controlled system of reports in officer selection folders. Concurrently, board members were provided erroneous information that concealed and exacerbated the illegal and inequitable competitive impact of the controlled system of reports. This resulted in violation of his legal and statutory entitlement to fair and equitable promotion consideration. The boards that considered him for promotion were held contrary to statute, directive, and regulation. The Department of Defense (DoD) directive requirement for separate boards for each competitive category was not granted. 10 United States Code (USC) Sections 616 and 617 require the majority of board members to recommend and certify both, the officer and the officers best qualified. The operation of the Air Force selection boards did not comply with Sections 616 and 617. Based on these illegal actions, he requests that his promotion nonselections be set aside and correction of his record to reflect continuous active duty until the first day of the month following the decision on this petition.

In support of the appeal, counsel submits a five page brief, with one attachment entitled "Documentation of Dishonesty, Deceit and Deception."

Applicant's complete submission, with attachment, is attached at Exhibit A.

STATEMENT OF FACTS:

Applicant was commissioned a second lieutenant on 11 July 1963 and entered extended active duty. He was promoted to the grade of permanent major effective 11 July 1977.

Applicant was considered and not selected for promotion to the grade of lieutenant colonel by the Calendar Years 1978, 1979, 1980, and 1981 (CY78/79/80/81) Temporary Lieutenant Colonel Selection Boards. Additionally, he was considered and nonselected by the CY82 Central Lieutenant Colonel Board.

OER/OPR profile since 1974 follows:

| <u>PERIOD ENDING</u> | <u>EVALUATION OF POTENTIAL</u> |
|----------------------|--------------------------------|
| 15 MAY 74 | 9-4 |
| 15 MAY 75 | 9-4 |
| 31 DEC 75 | 3-3-3 |
| 15 MAY 76 | Abbreviated Report |
| 31 DEC 76 | 2-3-3 |
| 31 DEC 77 | 2-2-2 |
| 28 JUL 78 | Education/Training Report |
| 30 JAN 79 | 1-1-1 |
| 30 JAN 80 | 1-1-1 |
| 1 JUN 80 | 1-1-1 |
| 30 NOV 80 | 1-1-1 |
| 3 MAY 81 | 1-1-1 |
| 3 MAY 82 | 1-1-1 |

On 31 July 1983, applicant was relieved from active duty in the grade of major and on 1 August 1983 retired for length of service. He served 20 years and 20 days of active duty.

AIR STAFF EVALUATION:

The Chief, Officer Evaluation Programs Branch, AFMPC/DPMAJE, reviewed the application and states that the controlled OER system was not illegal or unfair. The system was designed to differentiate and identify the best qualified officers for promotion in a competitive system and it did. Regarding the link between time-in-grade (TIG) and ratings, management understood that as officers approach promotion eligibility for each grade, the percent of top block ratings usually increase. Today, as it was 16 years ago, it is reasonable to expect that more senior,

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experienced, and mature officers in competition with less experienced contemporaries would receive a higher percentage of top block ratings. The ratings awarded to an officer is far more likely a function of actual performance rather than the TIG perception. However, perceptions of the latter spread quickly and ultimately could not be ignored. Air Force senior leadership addressed these perceptions because it became evident the controlled OER system negatively influenced the officer corps' morale and motivation. The controlled rating concept met most of its intended goals. As with any evaluation system used by any large organization, regardless of how effective the system may work, concern for morale will ultimately cause the organization to reassess such a system periodically to ensure the benefits don't outweigh the costs. The Air Force concluded that a change was desirable and in 1978, the Chief of Staff agreed to terminate the rating control limitations. However, these changes were not made because the system operated illegally or treated officers unjustly. Applicant presents no conclusive evidence to support his allegations of unfair treatment and the case should be denied because of the elapsed time between this appeal and the alleged wrong, and secondly, because applicant has failed to prove the existence of any error or injustice.

A complete copy of the evaluation is attached at Exhibit C.

The Chief, Selection Board Secretariat, AFMPC/DPMAB, reviewed the application regarding Defective Selection Boards and recommends denial. Although counsel challenges the operating procedures of promotion boards including the panel concept used by the Air Force, the Air Force has used the panel concept for many years in conducting selection boards and the procedure was reviewed as late as February 1992 by HQ USAF/JAG and AFMPC/JA in May 1994. The panel concept has safeguards to insure an equal distribution of the quality spectrum of records to each panel. As each panel scores its records, an order of merit (OOM) is formed. It is the board president's responsibility to review the OOMs to insure consistency of scoring on each panel and consistency of quality among the 'panels. Without exception, the quality of records always has been identical at the same percentage level on each OOM. While it is true that the board members do not see a complete select list, under the panel concept one panel does not have to know what the other panels have done. The panel's task is to align their records in an OOM 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 known as the "gray zone." In resolving gray zone ties, the panel understands that all records scoring higher than the lowest select on its OOM are also selects. In the previously referenced February 1992 review, the USAF/JAG also reviewed 10 USC Section 616(c) and 10 USC 617(a) and determined that the selection board procedures comply with the applicable provisions of statute and policy. Counsel claims the promotion boards were conducted in violation of Department of Defense Directive (DoDD) 1320.9 which required separate selection boards for each competitive category. However, other portions of

DODD 1320.09 stated: "Selection boards convened for different competitive categories or grades may be convened concurrently," and "When more than one selection board is convened to recommend officers in different competitive categories or grades for promotion, the written reports of the promotion selection boards under 10 USC 617 may be consolidated into a single package for submission as prescribed under 10 USC 618."

A complete copy of the evaluation is attached at Exhibit D.

The Chief, Appeals and SSB Branch, AFMPC/DPMAJA, reviewed the application and recommends denial on the basis of timeliness; if considered, deny due to lack of merit. They have analyzed applicant's record and his record speaks for itself. Specifically, applicant was rated using the system in effect preceding the controlled rating system. There were a mixture of recommendations ranging from performing well in his present grade, to advancement ahead of his contemporaries, to outstanding growth potential. Most of these reports included front side mark downs (FSMDs). His December 1975 report was marked three straight across, with FSMDs. He was a temporary major at this point. His May 1976 report was abbreviated with FSMDs. The December 1976 report reflected a two from the rater, three from the additional rater and reviewer and FSMDs. The December 1977 report reflected twos straight across with FSMDs. He had been selected for permanent major by this time with these reports in his record. The majority of applicant's peers received "firewall" reports with the front marked all the way to the right. Also the controls on the rating were only on the final indorser. It is doubtful that applicant would have been promoted without the control OERs in his records. Applicant has not established the controlled OER system was illegal or that the controlled OERs were the sole cause of his non-selection for promotion. Applicant has not established the promotion process is flawed, nor has he submitted evidence to substantiate any of his allegations, nor has he provided any statements from supervisors or other officials in the rating chain to support the ratings of record are in error.

A complete copy of the evaluation is attached at Exhibit E.

The Chief, Retirements and Separations Division, AFMPC/DPMARSP, reviewed the application and states that it appears there were no injustices or irregularities that occurred with applicant's nonselection for promotion; there were no error or injustices in the processing of applicant's retirement. They nonconcur with the request for continuous service credit. There are no provisions or justifiable reasons to continue to award service credit for unearned service past retirement eligibility. Therefore, they recommend denial.

A complete copy of the evaluation is attached at Exhibit F.

The Staff Judge Advocate, AFMPC/JA, reviewed the application and recommends denial on the basis of timeliness. They state that applicant has failed to file within the allotted time period and has not satisfactorily explained this failure. It would not be in the interest of justice to excuse the failure. It is also their opinion that applicant, on the merits, has failed to present relevant evidence of any error or injustice warranting relief.

A complete copy of the evaluation is attached at Exhibit G.

APPLICANT'S REVIEW OF AIR STAFF EVALUATION:

Counsel reviewed the Air Staff evaluations and reiterates his position that applicant was the victim of a systemically inequitable and illegal evaluation system. The error was compounded by the actions and inactions of officer selection boards that violated applicant's legal and regulatory entitlement to be considered for promotion on a fair and equitable basis. Applicant was intentionally uninformed and misinformed concerning the fairness and equity of the controlled system/selection boards. Counsel states that promotability is not the issue before the AFBCMR, rather it is the removal of the nonselections for promotion and the retirement/separation. The provisions of law and directive were violated by the Air Force selection board procedures used when applicant was considered for promotion. Applicant asks the Board to set aside the results of the tainted selection boards. Applicant's timely and legal access to information he was entitled to by law was violated by numerous Air Force acts of fraudulent concealment. Fraudulent concealment circumvents an Air Force time bar defense.

In support of applicant's request, counsel submits an eight page rebuttal with five attachments.

Counsel's complete response is attached at Exhibit I.

FINDINGS AND CONCLUSIONS OF THE BOARD

1. The application was not filed within three years after the alleged error or injustice was discovered, or reasonably could have been discovered, as required by Section 1552, Title 10, United States Code (10 USC 1552), and Air Force Regulation 31-3. Although the applicant asserts a date of discovery which would, if correct, make the application timely, the essential facts which gave rise to the application were known to applicant long before the asserted date of discovery. Knowledge of those facts constituted the date of discovery and the beginning of the three-year period for filing. Thus the application is untimely.

2. Paragraph b of 10 USC 1552 permits us, in our discretion, to excuse untimely filing in the interest of justice. We have carefully reviewed applicant's submission and the entire record, and we do not find a sufficient basis to excuse the untimely filing of this application. The applicant has not shown a plausible reason for delay in filing, and we are not persuaded that the record raises issues of error or injustice which require resolution on the merits at this time. Accordingly, we conclude that it would not be in the interest of justice to excuse the untimely filing of the application.

3. 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.

DECISION OF THE BOARD:

The application was not timely filed and it would not be in the interest of justice to waive the untimeliness. It is the decision of the Board, therefore, to reject the application as untimely.

The following members of the Board considered this application in Executive Session on 18 September 1995 under provisions of AFR 31-3:

Mr. Walter A. Willson, Panel Chairman
Mr. Gregory H. Petkoff, Member
Ms. Martha Maust, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 1 Sep 94, w/atch.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFMPC/DPMaje, dated 13 Dec 94.
- Exhibit D. Letter, AFMPC/DPMAB, dated 19 Dec 94.
- Exhibit E. Letter, AFMPC/DPMaja, dated 3 Jan 95.
- Exhibit F. Letter, AFMPC/DPMARSP, dated 15 Feb 95.
- Exhibit G. Letter, AFMPC/JA, dated 13 Apr 95.
- Exhibit H. Letter, AFBCMR, dated 8 May 95.
- Exhibit I. Counsel's response, 3 Jul 95.

Walter A. Willson
WALTER A. WILLSON
Panel Chairman