

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

JUL 02 1998

IN THE MATTER OF:

DOCKET NUMBER: 97-02612

COUNSEL: NONE

HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

He be promoted to the rank of captain retroactive to his original effective date of 13 January 1997.

APPLICANT CONTENDS THAT:

Propriety actions to remove his name from the promotion list were not brought to his attention until 21 January 1997, when he was verbally notified. As outlined in Air Force Instruction (AFI) 36-2501, paragraphs 5.3, 5.11, 12.4.1 and Attachment 1, the officer must be informed before effective date of promotion, and not the "pin-on" date or public release date as Legal has stated.

In support of the appeal, applicant submits two statements from the Circuit Defense Counsel stating that the plain language of AFI 36-2501, paragraph 5.11, clearly provides an exception to what is normally the effective date of promotion. In the applicant's case it was not the date of the order that announced his promotion, but the planned specified earlier date of 13 January 1997. His commander's initiation of removal action on 21 January 1997, eight days after the planned effective date of applicant's promotion to captain, was tardy. The AFI, as currently written, may make it impossible for commanders to remove officers from promotion lists who have a date of rank and pay date specified earlier than the date of the order that announces the promotion, but that is a concern that should be addressed in re-writing the AFI. The language of the AFI prevented the applicant's commander from initiating action removing applicant's name from the promotion list because the effective date of his promotion had already passed.

Applicant also submits a staff summary sheet, memorandum for record, HQ AFPC message, and AFI 36-2501 extract.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

Applicant was commissioned a second lieutenant in the Reserve of the Air Force on 18 May 1996 and entered extended active duty on 11 June 1996.

Applicant was selected for promotion to the grade of captain by the CY96E Central Captain Selection Board.

On 20 November 1996, applicant was notified of his commander's intent to impose nonjudicial punishment upon him for (a) unlawfully and disgracefully touching a military subordinate in a sexual manner on or about 19 October 1996, and (b) unlawfully and disgracefully making statements of a sexual nature to his military subordinates between on or about 1 July 1996 and on or about 19 October 1996.

On 12 December 1996, after consulting with counsel, applicant waived his right to a trial by court-martial, requested a personal appearance, and submitted a written presentation.

On 16 December 1996, he was found guilty by his commander who imposed the following punishment: forfeiture of \$1000.00 pay per month for two months, and a reprimand. The forfeiture in excess of \$500.00 pay per month for two months was suspended until 15 June 1997, at which time it would be remitted without further action, unless sooner vacated. The suspension of the forfeiture was contingent on his completion of Sensitivity Training from Actions.

The Article 15 was filed in his Unfavorable Information File (UIF).

The results of the promotion board were approved by the Assistant Secretary of Defense (Force Management Policy) (ASD/FMP) on 13 January 1997, and public release of the results was 28 January 1997.

On 21 January 1997, applicant was verbally notified by his commander that action was being initiated to remove his name from the CY96E promotion list to captain.

On 27 January 1997, applicant was provided written notification by his commander of the removal action being initiated against him. Specific reason for this action was his failure to meet prescribed standards of performance and conduct for an Air Force officer. Specifically, he made inappropriate comments and touched several of his female subordinate enlisted medical technicians.

Applicant's projected promotion would have been effective 13 January 1997 (ASD/FMP approval date). The CY96E promotion list results were made public on 28 January 1997.

On 22 May 1997, the Secretary of the Air Force directed that the applicant's name be removed from the list of officers selected for promotion by the CY96E captain selection board.

OPR profile since 1996, follows:

| <u>PERIOD ENDING</u> | <u>EVALUATION OF POTENTIAL</u> |
|----------------------|--|
| # 30 Aug 96 | Meets Standards (MS) |
| ## 31 Jul 97 | MS rating in Blocks 1,4,6 Does Not MS in Blocks 2,3,5 (Referral) |

Top report at time of CY96E board.

Top report at time of CY97D board.

Applicant was considered and nonselected for promotion to the grade of captain by the CY97D Central Captain Selection Board.

Applicant was discharged on 23 February 1998, under the provisions of AFI 36-3207 (Misconduct), with a general discharge in the grade of first lieutenant. He had completed 9 years, 2 months, and 7 days of total active military service.

AIR FORCE EVALUATION:

The Chief, Officer Promotion & Appointment Branch, Directorate of Pers Prog Mgt, AFPC/DPPPPO, reviewed the application and states that based on the applicant's date of rank of 14 August 1994, his two-year anniversary for promotion to captain would have been 14 August 1996. Since promotion to captain requires selection by a board and based on the date he entered active duty, the first board he was eligible to meet was the 12 November 1996 Central Captain Selection Board. Because the applicant was considered "overdue for promotion," upon public release of the board results (28 January 1997), he could have been promoted immediately, with a date of rank and effective date of ASD/FMP signature (13 January 1997). This is done to ensure overdue officers do not lose out on pay and allowances for the new grade. Promotion orders were published for all overdue officers from the 12 November 1996 board on 3 February 1997. This allowed sufficient time for commander's to notify all officers of their select/nonselect status, determine if officers were qualified for promotion and to allow the selected officers sufficient time to either accept or decline their promotion. The applicant was

never placed on promotion orders to effect his promotion. In instances where officers receive promotions with dates of rank and effective dates backdated to specific dates, the only period of time when promotion propriety actions can be initiated, is between approval of the board results and public release in on date. As in the applicant's case, he was verbally notified that action was being taken to remove his name from the promotion list prior to public release of the results. The removal package was properly documented and found to be legally sufficient. Therefore, they recommend denial of applicant's request.

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

The Staff Judge Advocate, AFPC/JA, reviewed the application and states that in accordance with 10 U.S.C. 629(a), an officer's name may be removed from a promotion list by the President (such authority has been delegated to the Service Secretaries). AFI 36-2501 (the successor to AFR 36-89) is the Air Force Instruction that implements that law for the Air Force and sets out the procedures for removal. Consistent with the statutory procedures for delaying a promotion found at 10 U.S.C. 624(d)(3), the Instruction provides that an action to remove an officer's name from a promotion list must be initiated before the effective date of promotion. AFI 36-2501, para 5.11. The term "effective date of promotion" is defined in Attachment 1 of the Instruction as follows: Effective Date of Promotion - Also known as the current grade effective date of promotion, this is the date on which pay and entitlements are effective. It is normally the date of promotion; i.e., the date of the order that announces the promotion, unless announcement of a specified earlier date is in the order. Initiate all promotion propriety actions before the effective date of promotion. Normally this date cannot be earlier than the officer's extended active duty (EAD) date in that grade, ASD(FMP) approval of the selection board results to the grade of captain, or Senate confirmation to the grades of major through colonel. Based on this definition, applicant argues that his promotion removal was improper; i.e., because the order announcing his promotion provided for an effective date that preceded the date he was notified of the removal, the action is without effect. They disagree. Admittedly, the definition cited above is potentially confusing. The term "effective date of promotion" is not defined in the statute (Defense Officer Personnel Management Act (DOPMA)) or its legislative history. In fact, in the Defense Officer Personnel Management Act Technical Corrections Act Report, two different terms, "effective date" and "projected date," are seemingly used interchangeably to describe the term "effective date of promotion," and they would appear to be the same thing - the date the promotion is actually made. This interpretation is consistent with opinions from this office dating back to the early 1980's, that the requirement to initiate

a promotion propriety action before the "effective date of promotion" (as provided in Chapter 36, Title 10, United States Code and AFI 36-2501) is a requirement to initiate the action before the promotion is made - the date the Air Force actually intends to promote the individual, which may or may not coincide with the date the promotion will be made effective for pay and allowances and time-in-grade purposes. They have also concluded that as a general rule promotions are "made" on the date of the order announcing them - again, recognizing that the order may provide for an earlier "effective date" in appropriate circumstances. More importantly, this conclusion is supported by the sectional analysis of the legislative history of the removal statute itself (10 U.S.C. 629): Section 629 relates to removal from a promotion list. It would authorize the President to remove the name of any officer from a list of officers recommended for promotion. It is intended that such removal could be effected by the President at any time prior to the promotion of the officer H.R. Rep. No. 1462, 96th Cong. 2d Sess. (1980), at p. 74. Having reached this conclusion, the next logical question is: When is a promotion made? Because the promotion of a commissioned officer is a new appointment in a higher grade, the same prerequisites to the appointment of officers, also apply to their promotion; i.e., (1) nomination by the President; (2) confirmation by the Senate (except promotion to first lieutenant); (3) tender of the appointment; and (4) acceptance of the tender. Air Force Pamphlet (AFP) 110-3, paras 3-12, 3-5a. Acceptance may be implied, and an officer is considered to have accepted the promotion "on the date on which the appointment is made unless he expressly declines the appointment." 10 U.S.C. 626. See also AFI 36-2501, para 3.16 and AFP 110-3, para 3-5c. The pre-DOPMA provisions predating Section 626 (Sections 8312 (regular) and 8394 (reserve) provided that a promotion was considered to be accepted "on the date of the order announcing it" unless the officer declined it. There is nothing in the legislative history of DOPMA to suggest any Congressional intent to change that definition of "promotion acceptance." Consequently, it seems clear that Congress intended "the date on which a promotion is made" to continue to coincide with the date of the order announcing it. The applicant, however, avers that the retroactive date for pay and allowances provided for in the order announcing his promotion, controls initiation of a promotion propriety action. If they were to accept his interpretation, the initiation of a promotion propriety action in cases like his where the officer is "overdue" could never occur. Such a result was clearly never intended. This can be illustrated by an example involving promotions generated by the Air Force Board for Correction of Military Records (AFBCMR) that involve retroactive effective dates. Obviously, the prerequisites for promotion discussed above cannot all be met (e.g., acceptance of the tender) if the promotion is considered "made" before the order announcing it. The use of

retroactive effective dates is therefore permitted as an administrative act whose practical significance goes more to the entitlement to pay and allowances than to anything else. Section 628 of Title 18, dealing with promotions recommended by special selection boards and incorporating the delay provisions of Section 624(d) by reference, provides another example. As the Board is aware, virtually all of these promotions involve retroactive effective dates. Consistent with these provisions, AFI 36-2501, para 6.7.2, provides that an officer selected for promotion by a special section board is subject to review by his or her commander for delay of promotion or removal action. This is so even if the officer is to be given a retroactive effective date of promotion. Finally, it is important to note that a military promotion is not a property right, nor does an officer otherwise have a vested interest in obtaining a promotion. Congress has made clear its intention that officers not be promoted where there is reason to believe the officer is not mentally, physically, morally, or professionally qualified to perform the duties of the next higher grade, notwithstanding a previous selection. 10 U.S.C. 624(d)(2); 10 U.S.C. 629(a). The applicant fits into that category. For the reasons expressed, it is their opinion that the applicant's removal from the promotion list was properly initiated, and that he has failed to establish an error or injustice warranting relief. Accordingly, they recommend that the application be denied.

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

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant reviewed the Air Force evaluations and has submitted comments in response to each paragraph of the evaluations. In addition he states that an officer should not be promoted where there are reasons to believe the officer is not mentally, physically, morally or professionally qualified to perform the duties on the next higher grade. He received an article 15 over a year ago. He made his share of mistakes and accepted responsibility for his actions. He has learned from his past and has paid his dues. He is now ready to continue on in his military career. The letter of support from his previous temporary supervisor and his latest Performance Feedback both show that he has the required qualities needed of an officer who is to be promoted to the next higher grade. It is his opinion that his removal from the promotion list was improperly initiated, and that he has succeeded in establishing that an error or injustice warranting relief.

In further support of his appeal, applicant submits a statement from the Circuit Defense Counsel stating the applicant's commander was aware of the allegations made against him (applicant) since October 1996. He could have informed the

applicant at any time in November or December that he would non-recommend him for promotion. He did not, and the effective date of applicant's promotion had passed by the time the commander got around to doing so. Mr. L--- himself acknowledges that the "effective" date of applicant's promotion was the date ASD/FMP signed the promotion list (13 January 1997). However, Mr. L--- then requests that the AFBCMR ignore the plain meaning of the language in AFI 36-2501 (and its definition of "effective date" of promotions) because, "promotion propriety action in cases like his where the officer if overdue could never occur" if applicant's position was accepted. Mr. L---'s concern is misplaced and incorrect. In paragraph 9 of his letter, applicant discusses why Mr. L---'s concern that promotion propriety actions "could never occur" is incorrect. Even if Mr. L---'s concern was correct, the remedy is to re-write the AFI. The AFI may be confusing, and may be written in a way not intended, however, the law requires that any ambiguity in a regulation or statute be resolved in applicant's favor. Applicant's promotion to captain was improperly denied after ASD/FMP had approved it on 13 January 1997.

Applicant's complete response, with attachments, is attached at Exhibit F.

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. Applicant's contentions have been adequately addressed by the Staff Judge Advocate and we agree with their comments and recommendations and adopt their rationale as the basis for our conclusion that the applicant has not been the victim of an error or injustice. Therefore, in the absence of evidence to the contrary, we find no basis to recommend granting the relief sought in this application.
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 16 June 1998, under the provisions of AFI 36-2603:

Mr. David W. Mulgrew, Panel Chair
Mr. Frederick R. Beaman 111, Member
Mr. Joseph G. Diamond, Member

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 24 Aug 97, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, AFPC/DPPPPO, dated 16 Oct 97, w/atchs.
Exhibit D. Letter, AFPC/JA, dated 3 Dec 97.
Exhibit E. Letter, AFBCMR, dated 22 Dec 97.
Exhibit F. Applicant's Response, dated 29 Dec 97, w/atchs.


DAVID W. MULGREW
Panel Chair