

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 96-10004

COUNSEL:

HEARING DESIRED: YES

AUG 13 1998

APPLICANT REQUESTS THAT:

1. His nonselection for promotion to the Reserve grade of major general by the CY90 Air Force Reserve General Officer Selection Board, which convened on 26 October 1989, be declared void.
2. His records be corrected to reflect he was selected for promotion to the Reserve grade of major general by the CY90 Air Force Reserve General Officer Selection Board, which convened on 26 October 1989; and, that he was thereafter promoted with an appropriate date of rank.
3. His retirement as a Reserve brigadier general, effective 12 March 1991, be declared void.
4. His records be corrected to reflect his retroactive restoration to active Reserve status, effective 12 March 1991.
5. He be awarded the requisite number of points and pay since 12 March 1991 (a minimum of 50 points for each retirement year since March 1991).
6. Any further relief as may be deemed necessary and/or appropriate in order to accord full and complete relief.

APPLICANT CONTENDS THAT:

His failure of selection for promotion to the Reserve grade of major general by the 26 October 1989 Reserve General Officer Selection Board was materially and legally in error and unjust for the following reasons:

1. He was not considered on a "fair and equitable basis", and "without prejudice or partiality" in violation of 10 U.S.C. 9362(d) and the specific instructions issued to the 1989 selection board were improperly and unduly influenced by having received a "priority list," of officers being considered by the 1989 selection board, which was formulated prior to and/or at a "conference" and/or "special meeting" of general officers held on 20 and 21 September 1989 in the Pentagon, under the auspices of

the Chief of Air Force Reserve add with the apparent concurrence of at least the Deputy Chief of Staff for Personnel (DP).

2. One of the "conferees" ([REDACTED], USAFR) at the 20-21 September 1989 conference had access to the "priority list" and discussions pertinent thereto, as evidenced by his participation in the conference, served as a voting member of the 1989 selection board.

3. Prior to the convening of the 1989 selection board, the Chief of the Air Force Reserve ([REDACTED] met with the three Reserve members ([REDACTED]) of the 26 October 1989 selection board and, among other things, showed them his "priority list."

4. Three (3) of the "conferees" ([REDACTED]) at the 20-21 September 1989 conference who had access to the "priority list" and the discussions pertinent thereto, were considered for promotion by the 1989 selection board, and one [REDACTED] was in fact selected for promotion by the 1989 selection board.

5. The results of the action by the 1989 selectis.n board were made known to, at least, AF/DP ([REDACTED]) and the Secretary of the Air Force ([REDACTED]) before the selection board adjourned.

6. At least two of the officers ([REDACTED] and [REDACTED]) considered and selected for promotion by the 1989 selection board should have been deemed not "fully qualified" and not "best qualified" for promotion because one of the candidates ([REDACTED]) had not served for a period of six months in a major general billet as required by AFR 45-34, paragraph 7.b(3), and the other candidate ([REDACTED]) had been convicted of the misdemeanor offense of driving under the influence of alcohol over three years earlier, serving two days in jail, being fined \$700 and other conditions, which were suspended for a period of three years.

7. The manner in which he was considered was contrary to and in violation of Department of Defense (DoD) and Congressional policy to insure the "independence and integrity of selection boards."

8. His failure of selection for promotion is materially and legally in error and unjust in light of his professional qualifications and record of service.

In support of his request, applicant submits a Statement of Facts, Counsel's Brief, and additional documents associated with the issues cited in his contentions (Volumes I - III). These documents are appended at Exhibit A.

STATEMENT OF FACTS:

The following information was extracted from the documentation submitted by the applicant.

On 9 June 1956, the applicant was appointed a second lieutenant, Reserve of the Air Force. He was awarded the Aeronautical Ratings of Navigator on 19 December 1957, Senior Navigator on 29 July 1965 and Master Navigator on 27 December 1972. Applicant completed Squadron Officer School (correspondence), February 1959; Air Command and Staff College (ACSC) (in residency), June 1971; and the National Security Management Course, Industrial College of the Armed Forces (correspondence), August 1973.

The applicant was progressively promoted to the grade of brigadier general, Reserve of the Air Force, with the effective date and date of rank of 12 March 1986.

In November 1980, while serving in the grade of Colonel, applicant became the Individual Mobilization Assistant (IMA) to the [REDACTED] until June 1987. On 30 June 1987, while serving in the grade of brigadier general, the applicant assumed the duty of IMA to the [REDACTED]

From 1 April 1989 until his retirement, the applicant was assigned as the IMA to the Deputy Chief of Staff, [REDACTED]

The applicant was considered and nonselected for promotion to the Reserve grade of major general by the CY90 Reserve Major General Selection Board, which convened on 26 October 1989.

As of 30 June 1990, applicant had accrued a total of 33 years of satisfactory Federal service. He was credited with 9 years, 11 months and 9 days of active duty service.

On 28 February 1991, the applicant was relieved from his assignment with [REDACTED] and assigned to the Retired Reserve Section Awaiting Pay and placed on the Reserve Retired List, effective 12 March 1991. Applicant's Point Credit Summary, prepared 10 August 1991, reveals that as of the Retirement Year Ending (RYE) 8 June 1991, he was credited with 34 years of satisfactory Federal service.

On 27 April 1992, under the Freedom of Information Act, the applicant requested documents, to include his Reserve General Officer Selection Folder, pertaining to the 26 October 1989 Reserve Major General Selection Board. The applicant was notified on 29 March 1993 that a portion of the Selection Folder was exempt from disclosure. HQ USAF/RE informed the applicant that "All Air Force Forms 71, 77, and 78 closed out on or before 31 January 1991 are not available for review. They were rendered under an expressed promise of confidentiality and are exempt from

release under the Freedom of Information Act, according to Air Force Regulation 36-9. Disclosure of these forms would result in a clearly unwarranted invasion of personal privacy. The authority for this exemption is in the United States Code, Title 5, Section 552 (b) (6)."

AIR FORCE EVALUATION:

The Director of Personnel, HQ USAF/REP, reviewed this application and recommended denial. REP provided a detailed analysis of the case. REP concluded that the applicant's allegations concerning his nonselection to major general by the 1989 Reserve General Officer Selection Board have not been substantiated and the applicant has failed to demonstrate that an error or injustice occurred. A complete copy of this evaluation is appended at Exhibit C.

The Air Force General Officer Matters Office, AFGOMO, reviewed this application and recommended denial. AFGOMO provided a detailed summary addressing the applicant's numerous allegations focusing on his nonselection for major general by the 1989 USAFR General Officer Selection Board. AFGOMO concluded that the applicant's allegations were not substantiated as a violation of policy, directive or statute and therefore do not support the relief requested. A complete copy of this evaluation is appended at Exhibit D.

The Chief of the General Law Division, HQ USAF/JAG, reviewed this application and recommended denial. JAG provided a legal review of the case. JAG concluded that the applicant's allegations concerning his nonselection to major general by the 1989 Reserve General Officer Selection Board have not been substantiated and the applicant has failed to demonstrate that an error or injustice occurred. A complete copy of this evaluation is appended at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Counsel reviewed the advisory opinions and indicated that by reason of the three advisory opinions having failed to address whether applicant has demonstrated and proven the existence of an "injustice" within the fullest meaning of 10 U.S.C. , Section 1552, it is urged that the Board reject the adverse comments, opinions and recommendations contained in the advisory opinions; and, that the Board grant the relief requested. Counsel stated that none of the advisory opinions addressed or reconciled the injustice of applicant's failure of selection for promotion by the Reserve General Officer Selection Board, which convened on 26 October 1989, and the other matters from which applicant seeks relief. Had the advisory opinions undertaken to address the

question of whether the matters and evidence applicant presented as grounds for relief constitute an "injustice" within the meaning of 10 U.S.C. Section 1552, it is self-evident and indisputable that all three advisory opinions would have "in all reason" acknowledged that applicant's failure to selection by the 1989 selection board and the other matters from which applicant seeks relief do represent an "injustice" warranting approval of the relief requested.

Notwithstanding the merit of applicant's request that his application not be referred to AF/RE and AF/JAG, his request was not honored and, thereupon, the three advisory opinions were rendered in which the authors and/or signators of the opinions have recommended denial of relief. Applicant objects to the three advisory opinions in that they were rendered by officers who were junior to applicant and whose signators were active duty Regular Air Force officers and a retired Regular Air Force officer. Above and beyond their ranks, active duty and/or Regular Air Force status, as such had a bearing on their objectivity in their assessment of the occurrences giving rise to the error and injustice of applicant's failure of selection, and above and beyond their total and patent lack of understanding, appreciation and sensitivity to the "abiding moral sanction [of the Board and Secretary under 10 U.S.C. Section 1552] to determine, insofar as possible, the true nature of an alleged [error and/or] injustice and to take steps to grant thorough and fitting relief." Based on the cited procedural considerations, and independent of the substantive considerations cited as evidence of the error and lack of merit of the adverse advisory opinions, it is urged that the Board reject the advisory opinions and not utilize the advisories as a basis for the denial of relief.

Counsel stated that AFGOMO completely failed to acknowledge that an officer must be considered on a "fair and equitable basis." Instead, AFGOMO seeks to circumvent and obfuscate the "fair and equitable" doctrine by asserting that \"because there were 'problems' with the active duty selection process, those same problems applied to the reserve process" and that the "two processes were governed by separate sections of the law and different regulations." The lack of merit of AFGOMO's protestations is depicted and proven by the Court's recognition in *Roane v. United States*, that a similar certification " [could not] be accomplished" because of the manner in which the selection boards in *Roane* had functioned (officers being considered by panels vice the entire selection board).

Counsel stated that AFGOMO (as well as REP and OTJAG) failed to address or reconcile the following matters, which were cited in applicant's brief:

(1) On 13 July 1995, the DOD/IG specifically stated: "The Air Force [IG] elicited testimony that indicated a PRIORITY LIST WAS CIRCULATED AT THE OCTOBER 1989 SELECTION BOARD."

(2) [REDACTED], the [REDACTED] for the 1989 selection board, acknowledged that the "common practice was priority lists were prepared"; that it was his recollection that they still used a priority list for the 1989 selection board; and that the priority list was PROVIDED to the [1989 selection] board, which was consistent with the way [they] ran all of the general officer boards."

(3) [REDACTED] stated their "PRIORITY LIST WAS PRETTY IMPORTANT for the non-IMA guys..."

(4) [REDACTED] stated that "there were no outside influences on [the 1989 selection board] - OTHER THAN WHAT HAD BEEN GOING ON AT THE TIME WITH THE PRIORITY LIST AND THINGS LIKE THAT."

(5) In his "Report of Senior MA Conference", dated 22 September 1989 (the day after the "conference" concluded), [REDACTED] then [REDACTED] and Chair of the "special meeting", submitted as "Tab 5" - the priority list (AX 79) - the "BGS RECOMMENDED FOR PROMOTION TO MG" (AX77).

Counsel stated that in pursuit of its effort to circumvent the fact that AX79 was the priority list for the 1989 selection board, **AFGOMO** seeks to have this evidence ignored or "brushed aside" by professing that applicant provided "no evidence that these numbers represented anyone's priority numbers". In the **USAF/IG** testimony of [REDACTED] he identified the priority list submitted by applicant as being the priority list that was PROVIDED to the [1989 selection] board, which was consistent with the way [they] ran ALL of the aeneral officer boards."

In seeking to condone the use of the priority list for consideration by promotion boards, **AFGOMO** failed to cite any statute, regulation or directive that permitted this practice. Without presenting a shred of supporting evidence, **AFGOMO** claims that the "use of priority lists were strictly controlled in terms of number of individual permitted to appear on the list, etc. [(sic)"; that the priority "lists were handwritten by the senior officer concerned and listed, in priority order, those officers under his command he believed should be promoted to the next higher grade"; and that the "priority lists contained only the names, with no other extraneous information. Counsel stated that the fact that the priority list was "circulated at the October 1989 selection board", and the fact that **AFGOMO** stated that "use of priority lists [and] pre-board communications" had, indeed, **"OCCURRED** in September and October 1989", proves, among other things, the error of **AFGOMO's** self-serving, gratuitous, stereotyped and naked assertion that there "is no evidence the [1989 selection] board did not consider each candidate on the basis of his professional qualifications and record of service" and that the "board certified at the conclusion of the board that it carefully considered the case of each and every officer".

AFGOMO did not address or reconcile applicant's professional qualifications and record of service because if it had, AFGOMO would have been compelled to acknowledge the merit of the applicant being granted the relief requested. Counsel asks that the Board reject and not utilize the AFGOMO advisory opinion as a basis for the denial of relief.

Counsel stated that the AF/REP advisory opinion is a shorter version of the AFGOMO advisory opinion, with certain variations. AF/REP's assertion that applicant "provides no evidence... that the members of the 1989 selection board were improperly and unduly influenced" defies logic and is clearly without merit. REP would have the Board and Secretary believe that the members of the selection board functioned in a vacuum and completely "brushed aside" the "use of priority lists and pre-board communications that occurred in September and October 1989" and which is proven by the fact that 4 of the 5 officers on the priority list were selected. AF/REP ignored, disregarded and, again, "brushed aside" the information contained in the IG statement of [REDACTED] the incumbent Chief of Air Force Reserve, that "there were no outside influences on [the 26 October 1989 selection] board" - OTHER THAN WHAT HAD BEEN GOING ON AT THE TIME WITH THE PRIORITY LIST AND THINGS LIKE THAT."

In attempting to circumvent the impropriety of [REDACTED] attending the "special meeting" and serving as a voting member of the 1989 selection board, REP cites the general's status as a [REDACTED] as being the justification for his attendance at the "special meeting". The fact that there may have been justification for [REDACTED] attendance at the "special meeting" by virtue of his status as a "senior Mobilization Assistant" begs the question as to the impropriety of his having served as a voting member of the 26 October 1989 selection board after having attended the "special meeting" where the priority list was "circulated" and after his being exposed to the "re-board communications which occurred in September and October 1989." In an attempt to defuse the impropriety of [REDACTED] having served as a voting member of the 1989 selection board, REP points out that active duty officers, a lieutenant General and two major generals, also served as voting members of the 1989 selection board. The fact that there were three "active duty" general officers on the 1989 selection board is totally immaterial and irrelevant to the matter of the impropriety of [REDACTED] having served as a voting member of the 1989 selection board. Similarly, the fact that each member of the 1989 selection board "served under oath" and was "expected to perform his duties without prejudice or partiality", as required by law, neither eradicates the impropriety of the voting members having been exposed to the priority list and the pre-board communications, nor does it prove that the voting members of the selection board "brushed aside" the priority list and pre-board communications.

Counsel stated that while applicant may not have in his hip pockets confessions from one or more the members of the 26 October 1989 selection board admitting that [REDACTED] unduly influenced the outcome of the 1989 selection board, applicant submits that in light of the totality of the evidence that is before the Board and Secretary proving that a meeting did occur with the three Reserve members and that, at the very least, they had been shown [REDACTED] priority list, the error and lack of merit of REP's position is self-evident and indisputable. In this regard, the fact that the "final decision" rested with the 1989 selection board that was composed of three active duty and three Reserve members does not overcome the reality that a meeting did occur, that the three Reserve members were shown the "priority list" and that this "impacted" on the "independence" of at least three members of the 1989 selection board as a consequence of which applicant was not considered on a "fair and equitable basis", was not considered "without prejudice and partiality" in violation of 10 U.S.C., Section 8362(d), and, therefore, that applicant's failure of selection by the 1989 selection board was materially and legally in error and unjust and, accordingly, that applicant should be granted the relief requested in his application.

Counsel's response to the advisory opinions is appended at Exhibit G.

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 numerous contentions concerning his failure to be promoted to major general, Reserve of the Air Force, are duly noted. However, we are unpersuaded by the evidence presented that approval of the requested relief is appropriate. Other than his own statements, the applicant provides no corroborative evidence to suggest that the members of the duly constituted selection board would not perform their sworn duty, i.e., provide him a full and fair consideration based on his record. While the applicant's record may be outstanding, his nonselection is indicative of the intensely competitive nature of the promotion selection process. Apparently, while fully qualified, the applicant was not considered the best qualified by the selection board based on future potential. We are not convinced by the evidence presented that the applicant did not compete fairly with his peers. As to the "priority list," inasmuch as this list was to be handwritten, we are not persuaded that the typed list submitted was the actual list reviewed. Nevertheless, we note that "priority lists" have been the process used by the Air Force

for over 20 years and that this system was well known by most individuals having sufficient years in the service. At the time the applicant was considered for promotion to major general by the CY90 Air Force Reserve General Officer Selection Board, the use of "priority lists" were not prohibited under Air Force regulations. We therefore are of the opinion that, inasmuch as priority lists were equitably applied throughout the years, it was not unjust in this instance. We find that the applicant received fair and equitable promotion consideration under the rules, regulations and policies established by the Secretary of the Air Force at that time. Additionally, in our opinion, having your name on a "list" does not guarantee a promotion. The applicant has provided no evidence which shows that he was inequitably treated when compared to other similarly situated officers. We note the applicant's contention that two of the officers selected for promotion should not have been deemed qualified. We consider this to be a moot issue since the record of a promotion nominee goes through extensive review prior to Senate approval. Hence, if the nominee(s) was not fully qualified for the promotion, he would not have received Senate confirmation.

As to the issue of one of the conferees subsequently serving on the CY90 selection board, we note the Air Force Inspector General (IG) investigation concluded that the conferee in question acted without prejudice or partiality as a selection board member. Therefore, we find no merit in applicant's contention that his nonselection was indicative of the member in question being prejudiced by attending both the conference and serving on the CY90 selection board. With regard to the allegation that the results of the CY90 selection board were made known to AF/DP and the Secretary of the Air Force before the selection board adjourned, we find no evidence to support this claim.

In view of the foregoing, we are unpersuaded by the evidence presented that the applicant was denied fair and equitable consideration for promotion to the Reserve grade of major general by the CY90 Air Force Reserve General Officer Selection Board. Additionally, applicant's contentions concerning the selection board being conducted in violation of DoD and Congressional policy, in our opinion, have no merit. We further believe that the detailed comments provided by the respective Air Force offices adequately address the applicant's numerous contentions. We therefore agree with the opinions and recommendations 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.

THE BOARD DETERMINES THAT:

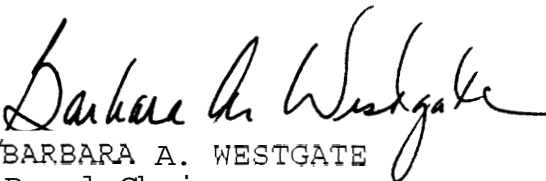
The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on **14 July 1998**, under the provisions of AFI **36-2603**:

Mrs. Barbara A. Westgate, Panel Chair
Mr. Henry Romo Jr., Member
Mr. Vaughn E. Schlunz, Member

The following documentary evidence was considered:

- Exhibit A. Letter from counsel, dated 27 Oct **95**, with attachments (DD Form **149**, dated 28 Feb **92**).
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, HQ USAF/REP, dated 5 Apr **96**.
- Exhibit D. Letter, AFGOMO, dated 8 Apr **96**.
- Exhibit E. Letter, AF/JAG, dated 5 Apr **96**.
- Exhibit F. Letter, SAF/MIBR, dated 18 Apr **96**.
- Exhibit G. Letter from counsel, dated 12 Nov **96**, with attachments.


/BARBARA A. WESTGATE
Panel Chair