RECORD OF PROCEEDINGS

AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: BC-2009-03821

XXXXXXXXXXX COUNSEL: NONE

HEARING DESIRED: YES

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APPLICANT REQUESTS THAT:

1.  His forced retirement be rescinded and all his rights and privileges (e.g. pay, allowances, and retirement points) be restored for the period 9 Nov 06 through his reappointment to the Puerto Rico Air National Guard (ANG) on 20 May 09.

2.  He be promoted to major general (O-8).

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APPLICANT CONTENDS THAT:

He was unjustly separated from his position as Assistant Adjutant General (AG) of the Puerto Rico ANG by the former Acting AG in a blatant act of reprisal for his testimony before the Senate of Puerto Rico regarding the Acting AG’s possible confirmation. His separation was illegal. The Acting AG issued the orders the day the Governor withdrew his nomination as AG. Furthermore, only the Governor can relieve Assistant AGs according to the Military Code of Puerto Rico. While the order indicates his removal was carried out by direction of the Governor, there is no documentation indicating the Governor gave such an order. The subsequent AG issued another illegal order transferring him to the standby reserve, which had the effect of terminating his federal recognition, thereby preventing him from finding another major general position. At the time of his forced retirement, the US Senate had approved his promotion to the rank of major general. He has since been reappointed to the Puerto Rico ANG by the current AG who has rescinded the illegal and improper separation orders. Since his federal recognition was removed by now rescinded orders, he believes his record should be corrected as requested.

In support of his request, the applicant provides an expanded statement with 15 attachments, which include copies of the aforementioned orders and correspondence related to the rescission of those orders, his testimony before the Puerto Rico Senate, the nomination of the former acting AG, and his reappointment to the Puerto Rico ANG.

The applicant’s complete submission, with attachments, is at Exhibit A.

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STATEMENT OF FACTS:

The applicant’s military personnel records indicate he was initially appointed into the Puerto Rico ANG from the retired reserve 23 Mar 05 in the grade of brigadier general (O-7), Reserve of the Air Force.

Information extracted from the Military Personnel Data System (MilPDS) indicates the applicant was transferred to the retired reserve on 10 Nov 06.

The applicant’s military personnel records indicate he was reappointed into the Puerto Rico ANG from the retired reserve on 22 May 09 in the grade of brigadier general (O-7), Reserve of the Air Force, in the position of Chief of Staff.

The remaining relevant facts pertaining to this application are contained in the letters prepared by the appropriate offices of the Air Force, which are attached at Exhibits C, D, and E.

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AIR FORCE EVALUATION:

NGB-GO recommends denial, indicating the applicant’s position as Assistant AG is a tenure of office position established in State law and appointment of individuals to that position must be made and terminated in accordance with State law. He was removed from the position by the former Acting AG. That decision was subsequently reviewed and ratified by the subsequent AG who executed the applicant’s transfer to the Air Reserve Personnel Center (ARPC). While the current AG has reinstated him, actions legally taken by previous AGs under State law cannot be negated through the revocation of State orders reflecting those decisions. With respect to his request for promotion to major general, he was nominated to meet the Fall 2005 Air National Guard Federal Recognition Board. Officers nominated to meet such boards may be nominated for one of two qualifications, General Officer of the Line (GOL) or Adjutant General Corps (AGC). Officers carrying a GOL qualification may serve in a variety of billets (e.g., commander, chief of staff, and staff or command billets). However, officers carrying an AGC qualification, as in the applicant’s case, may only serve in the positions of AG or Assistant AG of a state National Guard. Because he carried an AGC qualification, he was only eligible for promotion if assigned to an AG or Assistant AG major general billet. While he occupied the Assistant AG position during the matter under review, the authorized grade of that position was brigadier general. Therefore, the only way he could have been promoted to major general with his AGC qualification would be for him to be appointed as the AG by the Governor, which he was not.

A complete copy of the NGB-GO evaluation is at Exhibit C.

NGB-JA recommends denial, indicating the applicant has not demonstrated the existence of a material error or injustice that can be effectively remedied though correction of his military records. The applicant contends he was the victim of reprisal at the hands of the former Acting AG and that his separation was legally insufficient. Under Puerto Rico’s Law of Reprisals, no employer may discharge an employee should the employee offer any testimony before a legislative forum in Puerto Rico. On its face, the information submitted by the applicant suggests it is sufficient to meet Puerto Rico’s statutory standard of proof for a claim under this law. However, Assistant AGs serve at the convenience of the Commander-in-Chief (Governor). Therefore, the sufficiency of the application is questionable, at least, and as a matter for a court of competent jurisdiction to resolve (the applicant filed a civil suit before the U.S. District Court for the District of Puerto Rico against the Puerto Rico ANG and the former Acting AG). As for his argument the former Acting AG had no authority to effect his separation, the former Acting AG’s tenure did not end until 15 Nov 06, not the day his appointment was withdrawn as the applicant contends. As such, the former Acting AG was fully authorized to sign the contested order. As for his request related to promotion, the fact his name was confirmed by the US Senate does not carry its usual significance in this case. The applicant was not assigned to a major general billet and thus could not be promoted. He was processed for a certificate of eligibility (COE) under 32 USC 307(c), which is merely a determination that he is qualified for promotion should he be assigned to a position calling for the higher grade within two years of Senate confirmation. Furthermore, he was nominated for an AGC only COE, which means he could not compete for a line major general position, only a tenure office position (AG or Assistant AG). In Puerto Rico, there is only one such position, that of AG and he was never selected by the Governor for that position.

A complete copy of the NGB-JA evaluation is at Exhibit D.

AF/JAA recommends denial indicating the AG, under Puerto Rican law, has the authority to relieve an ANG officer from his position. The applicant was lawfully separated from the Puerto Rico ANG under AFI 36-3209, paragraph 2.25. Once separated from the Puerto Rico ANG under 32 USC 323, his federal recognition was withdrawn and he was transferred to the USAFR per 10 USC 12214. Thus the actions taken up to that point were in accordance with law and regulation. At that point, the former Acting AG ordered the applicant into the retired reserve; however, as the ANG no longer had jurisdiction over him, he had no authority to do so. However, this action was corrected by the subsequent AG’s order which directed the applicant’s discharge from the Puerto Rico ANG and transfer to the USAFR. As for his request related to promotion to major general, there is no evidence that had the actions not been taken under the original separation order, the applicant would have been promoted to major general. He was confirmed by the US Senate for the rank of major general in the qualification of AGC only. As such, the only way for him to be promoted would have been for him to be nominated and confirmed as the AG, which he was not. Additionally, it would be pure speculation to determine that, but for the discharge, he would have been nominated and confirmed as the AG anytime after Nov 06. As for his allegations of reprisal, even if the applicant had previously engaged in protected conduct/activity under the Military Whistleblower Protection Act, it does not appear he filed a complaint within the required 60 days. Based upon the information provided, he has not met his burden of proof to establish these acts were whistleblower retaliation.

A complete copy of the AF/JAA evaluation is at Exhibit E.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant respectfully requests the Board right an egregious injustice and not take the easy route. The former interim and never confirmed AG’s action to summarily and illegally retire him was a blatant abuse of power which caused his removal from the service for almost three years and the loss of a Senate confirmed promotion to major general. He hopes the Board will not become part of a clear injustice by validating the prosecutorial, fact omitting, and legally incorrect advisory opinions submitted for the Board’s consideration. They are based on an incorrect interpretation of Puerto Rican law which voids the premise upon which they stand—the orders were valid and both the former Acting AG and his successor had authority to effect his separation. He argues that neither had such authority as the law provides that Assistant AGs serve at the pleasure of the Governor as the Commander-in-Chief, not the AG. As for his allegations of reprisal, the NGB-JA advisory indicates that he has a Prima facie case. As for his promotion to major general, he indicates the NGB-GO advisory limits the possibility of him finding a tenure of office major general billet only to Puerto Rico, when in fact there are many other tenure of office positions (e.g. Assistant AG or AG) in other states for which he was fully qualified. The number one fact disregarded so far is the illegal retirement order has already been rescinded for cause by the current AG and such rescission has been found legally sufficient. He was the victim of a grave injustice which warrants that he be granted all loss of pay, allowance, emoluments, pecuniary benefits, and the promotion to which he was deprived as a result. In support of his response, the applicant provides an expanded statement with five attachments.

The applicant’s complete response, including attachments, is at Exhibit G.

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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.  Sufficient relevant evidence has been presented to demonstrate the existence of a probable error or injustice. The applicant contends that his separation from the Puerto Rico Air National Guard (ANG) was illegal because the former Acting Adjutant General (AG) and his successor lacked the legal authority to relieve him from duty and order his involuntary separation. After a thorough review of the evidence of record and the applicant’s complete submission, we believe the applicant has raised sufficient doubt as to the propriety of these actions. We note the comments by AF/JAA, NGB-GO, and NGB-JA that both the Acting AG and his successor had full authority to issue the contested discharge orders. Nevertheless, we do not believe that either order is effective, not because the Acting AG and his successor lacked authority to issue them, but because the orders are predicated on the applicant being improperly relieved from his position as the Assistant AG for Air, Puerto Rico ANG. In this respect, we note the comments by the Puerto Rico National Guard Staff Judge Advocate indicating the former Acting AG failed to follow the substantive requirements of Puerto Rican law in relieving the applicant of his duties. Accordingly, we do not believe the applicant’s loss of his position formed a legitimate basis for his administrative separation from the Puerto Rico ANG. Furthermore, the evidence presented indicates the initial separation order issued by the former Acting AG was so procedurally flawed that his successor was apparently compelled to issue the second order as a corrective measure. However, we believe the second order was also ineffective as the initial order, while predicated on a faulty basis, effectively removed the applicant from the jurisdiction of the Puerto Rico ANG through his discharge and subsequent transfer to the retired reserve. In view of the above and to preclude an injustice, we believe any doubt should be resolved in favor of the applicant. Therefore, we believe it appropriate to correct his records to reflect that he was not discharged from the Puerto Rico ANG on 9 Nov 06, but continued to serve until the date of his reappointment in the Puerto Rico ANG on 22 May 09. Additionally, we find it appropriate to credit him with the pay and points required to ensure the period 9 Nov 06 through 22 May 09 is satisfactory service for retirement purposes. In arriving at the appropriate amount of credit to be awarded, we calculated the average of his participation during his five most recent satisfactory years of service preceding his involuntary separation. Accordingly, we recommend his records be corrected to the extent indicated below.

4.  Notwithstanding the above, insufficient relevant evidence has been presented to demonstrate the existence of an error or injustice warranting the applicant’s direct promotion to the grade of major general (O-8). The applicant contends that were it not for his involuntary separation, he would have been promoted to the grade of major general. We took notice of the applicant's complete submission, including his response to the Air Force and National Guard Bureau (NGB) evaluations, in judging the merits of the case; however, we agree with the opinions and recommendations of the Air Force and NGB offices of primary responsibility (OPR) and adopt their rationale as the basis for our conclusion the applicant has not been the victim of an error or injustice. In our view, the promotion would only have happened if the Governor had selected the applicant to be the AG. However, we do not believe he has met his burden in establishing the Governor would have done so absent the AG’s unjust action. Moreover, such a nomination is beyond the authority of the Secretary of the Air Force and thereby beyond the authority of the AFBCMR in any event. Therefore, in the absence of evidence to the contrary, we find no basis to recommend the applicant’s requested “direct” promotion to the grade of major general.

5.  The applicant alleges he has been the victim of reprisal and has not been afforded full protection under the Whistleblower Protection Act (10 USC 1034). Based on our own independent review and notwithstanding our determination above of a probable error or injustice, we have determined the applicant has not established that his removal from his position and subsequent discharge were motivated by retaliation for making protected communications. In reaching this determination, we note that he has submitted no direct evidence of this reprisal motive. We also note the AF/JAA comments indicating that it appears the applicant did not file a complaint within the required 60 days. While the applicant believes he has a Prima facie case, we do not believe he has met his burden of proof in establishing the reprisal motive and the causal connection to an adverse action. Rather, we believe the evidence provided establishes this, more likely than not, was a classic case of a personality conflict. Therefore, absent evidence to the contrary, we find no basis exists upon which to recommend granting any relief other than that indicated below.

6. 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 issues involved. Therefore, the request for a hearing is not favorably considered.

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THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to the APPLICANT be corrected to show that:

a.  He was not discharged from the Air National Guard (ANG) on 7 November 2006 and transferred to the Retired Reserve effective 9 November 2006. Instead, he continued to participate in a Traditional reserve status with the Puerto Rico ANG.

b.  He be awarded an additional 86 paid active duty training (ADT) points and four unpaid membership points for the retention/retirement (R/R) year 11 February 2006 through 10 February 2007, resulting in 167 total retirement points and one year of satisfactory Federal service for retirement.

c.  He be awarded an additional 113 paid ADT points, 39 paid inactive duty for training (IDT) points, and 15 unpaid membership points for the R/R year 11 February 2007 through 10 February 2008, resulting in 167 total retirement points and one year of satisfactory Federal service for retirement.

d.  He be awarded an additional 113 paid ADT points, 39 paid IDT points, and 15 unpaid membership points for the R/R year 11 February 2008 through 10 February 2009, resulting in 167 total retirement points and one year of satisfactory Federal service for retirement.

e.  He be awarded an additional 74 paid ADT points, 11 paid IDT points, and 4 unpaid membership points for the R/R year 11 February 2009 through 10 February 2010, resulting in 167 total retirement points and one year of satisfactory Federal service for retirement.

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The following members of the Board considered AFBCMR Docket Number BC-2009-03821 in Executive Session on 10 Mar 11, under the provisions of AFI 36-2603:

Mrs. XXXXXXXXXX, Panel Chair

Ms. XXXXXXXXXX, Member

Ms. XXXXXXXXXX, Member

All members voted to correct the records as recommended. The following documentary evidence pertaining to AFBCMR Docket Number BC-2009-03821 was considered:

Exhibit A. DD Form 149, dated 9 Oct 09, w/atchs.

Exhibit B. Applicant's Master Personnel Records.

Exhibit C. Letter, NGB-GO, dated 18 Aug 10.

Exhibit D. Letter, NGB-JA, dated 8 Sep 10.

Exhibit E. Letter, AF/JAA, dated 2 Feb 11.

Exhibit F. Letter, AFBCMR, dated 9 Feb 11.

Exhibit G. Letter, Applicant, dated 28 Feb 11, w/atchs.

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Panel Chair