

SECOND ADDENDUM TO
RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: BC-1999-02707

XXXXXXX

COUNSEL: XXXXXXXXXXXX

HEARING DESIRED: NOT INDICATED

APPLICANT REQUESTS THAT:

1. The Special Selection Board (SSB) results for the Calendar Year (CY) 1998A, CY1999A, and CY2000A Lieutenant Colonel MC Central Selection Boards, and the CY2000A Selective Continuation Board be declared void.
2. His Date of Separation (DOS) of 31 Jul 01 be declared void and he be constructively credited with the pay of the rank he would have been appointed to with all special pay, up until he is properly separated from the service.
3. His record be corrected to reflect a sequence of constructive grade advancements that are consistent with a fully qualified officer and in accordance with 10 USC 619 and 624, indicating that a reasonable grade advancement would be promotion to the grades of: lieutenant colonel (O-5) on 1 May 99, colonel (O-6) on 1 May 02, brigadier general (O-7) on 1 May 04, major general (O-8) on 1 May 06, and lieutenant general (O-9) on 1 May 08. By amendment, the applicant amended his request to include promotion to general (O-10), with a date of rank of 1 May 10.

APPLICANT CONTENDS THAT:

1. The SSBs for CY1998A and CY2000A promotion selection boards were comprised of the same officers in violation of 10 USC 612(b) and AFI 36-2501, *Officer Promotions and Selective Continuation*, which indicates that an officer cannot serve as a member of two successive boards considering officers of the same competitive category and grade. While the CY1998A and CY2000A SSBs were not technically "successive," they were held consecutively and served to deny the applicant the right to anonymity in the SSB process.
2. The Promotion Recommendation Forms (PRF), which met the contested SSBs, were not completed by the authorized senior rater(s). AFI 36-2406, *Officer and Enlisted Evaluation Systems*, explicitly mandates, "the senior rater of record at the time

eligibility is established will write the PRF." Three officers were chosen to write the PRFs from individuals who would have been the applicant's senior rater, had he remained on active duty at Grand Forks Air Force Base. This was an acceptable accommodation before 1 Jul 2000 when the identity of the authorized senior rater was not regulated.

3. The AF Form 77, *Letter of Evaluation*, included in his officer selection record (OSR), did not comply with the provisions of AFI 36-2608, *Military Personnel Records System*, which requires the AF Form 77 to include the comment, "No report available for the period _____ through _____. Officer restored to active duty by direction of the Secretary of the Air Force."

4. His records have yet to reflect his receipt of full and unrestricted practice privileges in his medical specialties. In accordance with AFI 44-119, *Medical Quality Operations*, his professional files must contain notice that he had unrestricted full privileges in each of his specialties with annual re-privileging notices and a notice of his active staff appointment with annual reappointment.

5. The officer selection briefs (OSB) prepared for the contested boards are nearly blank and without explanation from the Air Force. The Air Force needs to explain why certain blocks on the OSB are blank or reflect incomplete information. The inaccuracies of omission in the OSBs are the results of the applicant's wrongful discharge and are unfair, prejudicial, and make his service appear substantially worse than it would have been had he remained on active duty.

6. The officer performance reports (OPR), which were previously unsuccessfully contested before the AFBCMR, rendered for the periods ending 14 Aug 96 and 14 Aug 97, contain derogatory references to the applicant for which no follow up reporting of corrections for the alleged infractions are made available by the Air Force. The void in reporting leaves a prejudicial vacuum, created by the Air Force, which the applicant is not responsible to make up in letters to boards. The lack of corrections to the OPRs is prejudicial and makes the applicant's service appear substantially worse than it would have been absent these violations.

7. His DOS should be voided and he should be constructively credited with the pay of the rank he would have been appointed to, along with all back-pay, allowances, and special pays, of the rank he would have been appointed to, up until he is properly separated from the service.

8. He was unfairly involuntarily terminated in 1997, leaving his military records incomplete. The record would be populated with new records, except for the Air Force's wrongful actions. He has the right to properly constituted promotion boards, authorized raters, and a fair and complete OSR that meets these

boards. He has the right of return to his active duty position and in a grade of rank consistent with his former medical peers who were advanced.

In support of his request, the applicant provides an 11-page statement of counsel, with nine attachments, which include copies of his PRFs, LOEs, and OSBs.

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

STATEMENT OF FACTS:

On 4 Sep 01, the Board considered the applicant's request for removal of the adverse action report from the National Practitioner Data Bank (NPDB), restoration of full and unrestricted privileges in obstetrics and gynecology, restoration of active duty status with back-pay and allowances, replacement of his OPR rendered for the period ending 14 Aug 96, correction of his PRF that met the CY1996A promotion board to remove references to any adverse action, correction of both the OPR and PRF that met the CY1996A promotion board to eliminate "white space," removal of the OPR rendered for the period ending 14 Aug 97 from his records, and consideration of his record for promotion to the grade of lieutenant colonel by a SSB for the CY1996A CSB. After a careful review of the evidence of record and the applicant's complete submission, the Board denied his initial requests for correction of his record; however, the Board found that his discharge was technically flawed and recommended his records be corrected to show that he was not discharged from all appointments on 26 Nov 97, but he was instead continued on active duty and ordered permanent change of station (PCS) to his home of record until 30 Jun 98, on which date he was honorably discharged in the grade of major under the provisions of AFI 36-3207 (Nonselection, Permanent Promotion). Complete copies of the Memorandum for the Chief of Staff and the Record of Proceedings (including Exhibits) are attached at Exhibit O.

On 16 Sep 04, in accordance with a remand order from the United States Court of Federal Claims, the Board considered the applicant's request for reconsideration. He contended the Board's previous decision to correct the record to reflect his discharge for being twice passed over for promotion failed to take into account that his nonselections for promotion were directly related to the improper motives and actions of his command. After carefully considering all the facts and evidence in the case, the Board recommended the applicant be provided SSB consideration for promotion to the grade of lieutenant colonel for the CY1996A and CY1997A Lieutenant Colonel Medical Corps/Dental Corps (MC/DC) Selection Boards. The Board further recommended that if he was not selected for promotion by an SSB, that he be considered for continuation by the SSB for the

CY1997A MC Major Selective Continuation Board. Complete copies of the Memorandum for the Chief of Staff and the Addendum to the Record of Proceedings are attached at Exhibit W.

On 17 Nov 05, the SSB for the CY1996A CSB met, reviewed the applicant's record, but did not select him for promotion. On 18 Nov 05, the SSB for the CY1997A CSB met and the applicant was again nonselected for promotion; however, the CY1997A SSB did select him for continuation on active duty.

On 16 Mar 06, AFPC notified the applicant of his selection for continuation and advised that he could submit an application for reinstatement to active duty. The applicant did not submit a request for reinstatement, but instead determined to accept continuation in order to proceed with further SSB consideration(s) until selected for promotion.

On 22 Jun 06, the applicant, through counsel, accepted continuation for the three-year period ending 31 Jul 01 and requested SSB consideration for promotion to the grade of lieutenant colonel for the CY1998A, CY1999A, and CY2000A lieutenant colonel promotion boards.

On 19 Jul 06, the Board directed the applicant's records be corrected to reflect his date of separation of 31 Jul 01 and that his records be considered for promotion to the grade of lieutenant colonel by SSB for the aforementioned promotion selection boards. The applicant was non-selected for promotion by each board and was therefore considered for selective continuation by the SSB for the CY2000A board; however, he was non-selected for continuation.

On 22 Dec 09, the applicant submitted his instant request to the Board; however, his case was subsequently administratively closed, without prejudice, as he was pursuing similar relief through the court (Exhibit X).

On 7 May 10, the applicant requested a stay of his case before the court so that he could pursue his instant request before the AFBCMR. On 7 Jun 10, the court granted the applicant's request and his case before the AFBCMR was re-opened (Exhibit Y).

On 23 Nov 11, Counsel requested the applicant's case be administratively closed in order to provide a revised rebuttal to the advisory opinions described below. On 28 Nov 11, the applicant's case was re-opened.

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 Z through AF.

AIR FORCE EVALUATION:

AFPC/DPSID recommends denial. Having complied with the AFBCMR directive and the provisions of AFI 36-2406, the PRFs were accomplished within regulatory guidelines and although the AF Forms 77 used slighted different wording than that prescribed in the AFI, the wording used did not change the meaning or content of the forms. The applicant wants to determine whether the selection of the senior raters who wrote the PRFs that met the contested boards was in compliance with the applicable AFI. AFI 36-2406, *Officer and Enlisted Evaluation Systems*, paragraph 4.13, provides instructions when officers are "added" to promotion eligibility. Complying with AFBCMR instructions in which the applicant remained on active duty at Grand Forks AFB and becoming promotion eligible for the contested promotion boards, the senior rater established was the Wing Commander, Grand Forks AFB. The three officers designated to accomplish these PRFs were each assigned to this position during the original promotion cycles. The applicant's corrected record was used by the senior raters to accomplish the PRFs as with any other officer who is eligible for a particular promotion board and a PRF is accomplished.

The applicant also contends the AF Forms 77, prepared for consideration by the contested boards, did not comply with the provisions of AFI 36-2608, 1 Jul 96, paragraph 2.24.5. Upon review of these forms, it was discovered the statements placed on the contested AF Forms 77 included incorrect wording. While the wording used was not the exact wording prescribed in AFI 36-2406, it did not change the meaning or content of the AF Forms 77; therefore, the AF Forms 77 have been administratively corrected to include the comment, "Not rated for the above period. Report is not available for administrative reasons," rather than "No report available for the above period. No report required IAW AFI 36-2402." Having complied with the AFBCMR directive and AFI 36-2406, the PRFs were accomplished within regulatory guidelines and although the AF Forms 77 used slightly different wording, the wording used did not change the meaning or content of these forms.

The application should be also be dismissed as untimely under the equitable doctrine of laches as the applicant has unreasonably and inexcusably delayed in asserting his claim. The test to be applied is not whether he discovered the error within three years, but whether, through due diligence, it was discoverable (see OpJAGAF 1998/56, 28 Sep 88, and the cases cited therein). However, he waited over ten years to assert his claim. Clearly the alleged error(s) upon which he relies has been discoverable since the alleged error(s) occurred.

A complete copy of the AFPC/DPSID evaluation is at Exhibit Z.

AFPC/DPSOO recommends denial. The applicant contends there are various omissions in his OSBs that served to prejudice the SSB panel members; however, his OSBs are correct and the lack of

information in certain areas should not be construed as unfair or prejudicial. The *Professional Military Education (PME)* block is blank because the applicant had not completed any form of PME; the *Academic Education* block is blank because it holds only the two highest/most recent degrees updated by the Air Force Institute of Technology (AFIT) and training is not maintained anywhere on the OSB; the *Aeronautical/Flying Data* block is blank as it is intended to reflect flying hours for rated officers, which the applicant was not; the *Acquisition Corps* block is blank because the applicant did not meet the eligibility criteria (occupy a critical acquisition position and meet specific training and experience requirements); the *Joint Reporting Category* block is blank as it only applies to officers who have had an assignment to a Joint Duty Assignment, Joint Staff or to a Specified or Unified Command and/or a Defense Agency, which the applicant was not; the *Joint Duty* block is blank because the applicant never held a joint assignment; the *Overseas Duty History* is blank because the applicant was never assigned overseas; the *Assignment History* was correctly populated as the source documents for duty titles are the applicant's OPRs. The applicant was provided the opportunity to meet SSBs based on accepting continuation. He was fairly considered but was not selected for promotion. No additional relevant evidence has been presented to demonstrate the existence of a probable error or injustice. Further, to grant direct promotion would be unfair to the hundreds of officers with extremely competitive records who also were not promoted. Since there were no errors on the OSB, there are no grounds to direct further SSBs.

A complete copy of the AFPC/DPSOO evaluation is at Exhibit AA.

AFPC/PB recommends denial, indicating there is no evidence of an error or injustice with respect to the panel membership for his SSBs. Of the five SSBs which considered the applicant for promotion, only the CY1998A and CY2000A SSBs were conducted using the same board membership. The CY1999A board was reconstituted via SSB using different board membership. Thus, no board member served on successive boards considering the applicant for promotion. The standard practice, dating back to the early 1980s, is to apply the term "successive" to mean "by year" and not "in order of review." It is not uncommon and is entirely proper and consistent with Title 10 for an officer's record to be considered in alternate years during the same session of SSBs using the same board members. By doing so, no board member would serve on two successive SSBs for the purpose of considering an officer of the same grade and competitive category for promotion to the next higher grade.

A complete copy of the AFPC/DPSOO evaluation is at Exhibit AB.

AFPC/DPSOS recommends denial of the applicant's request to void his 31 Jul 01 DOS, indicating there is no evidence of an error or injustice. The applicant met the CY2000A promotion board and was not selected for promotion or continuation and his DOS was

appropriately established in accordance with 10 USC 632, *Effect of Failure of Selection for Promotion*.

A complete copy of the AFPC/DPSOS evaluation is at Exhibit AC.

AFMOA/SGHQ recommends denial of the applicant's requests related to his professional files, indicating the available documentation does not support his request. While he indicates that his records should reflect his receipt of full and unrestricted practice privileges in his medical specialties, including obstetrics, gynecology, family medicine, and aerospace medicine, his record indicates he did not hold privileges in family or aerospace medicine and he has provided no evidence that it should.

A complete copy of the AFMOA/SGHQ evaluation is at Exhibit AD.

AFPC/JA recommends denial, indicating the applicant has not documented any error or injustice, thus there are no grounds for the relief he seeks. Counsel petitions the Air Force to "show cause" as to why his 31 Jul 01 DOS should not be voided and he be constructively credited with pay of the rank he would have been appointed to, with all back-pay and allowances, up until he is properly separated from the service. However, the burden of proof of an error or injustice is on the applicant; the Air Force is not required to show cause as to why the applicant's DOS should be voided—particularly where the applicant has offered no evidence to support this request, nor even any theory as to why the request should be granted. The Board directed the applicant's record be corrected to reflect the contested DOS based on the applicant's acceptance of continuation by the SSB for the CY1997A Selective Continuation Board. It was the approval of the DOS by this Board that provided the basis to award the applicant SSBs for the CY1998A, CY1999A, and CY2000A promotion and selective continuation boards that his record ultimately met. He has offered no evidence whatsoever the DOS is incorrect or why that date should be invalidated.

Counsel takes this rather far reaching and unsupported request and carries it even further by requesting the Board have the Air Force show cause as to why the applicant's record does not reflect a sequence of constructive advancements during his separation from active duty that are consistent with a fully qualified officer and IAW 10 USC 619 and 624. In particular, he suggests the applicant be promoted all the way to the grade of lieutenant general. Once again, the burden of proof is on the applicant, not the Air Force to "show cause." However, the applicant has offered absolutely no evidence to support such a radical request. He was properly discharged from the Air Force because he was twice passed over for promotion to lieutenant colonel—both at the original central selection boards and the SSBs that were awarded in 2006. Further, the applicant has failed to prove any material error with respect to the conduct or outcome of those SSBs, or with the selection record that was considered by those boards. As a consequence, his discharge was

not only proper, it was required by law (10 USC 632). There is no basis to void the applicant's discharge and "constructively" continue him on active duty, promoting him along the way until he reaches the rank of lieutenant general. Even if an error had been established that would invalidate his 2001 discharge, the appropriate remedy would have included reinstatement and actual service before any service credit would be awarded. And any promotions would have had to come as a result of selection by actual promotion board, where the applicant would have competed against his peers. The scenario offered by counsel is nothing more than fanciful conjecture.

In summary, the applicant was properly discharged from the Air force. His nonselections for promotion—which formed the basis of the discharge under 10 USC 632—were fully supported by a record of substandard performance that was properly documented on the OPRs and PRFs of record. His military record that met the board was complete and accurate. Furthermore, there is no basis to withdraw any of the adverse or derogatory information from the applicant's record, nor is the Air Force required to document performance after 26 Nov 97, because the applicant never actually performed any active duty for the Air Force after that date. The decision by the Board to change his record to show he was discharged pursuant to 10 USC 632 on 31 Jul 01 conferred a benefit on the applicant, having deleted from his record his request for discharge in lieu of discharge for cause that it reflected originally. Given the applicant's overall substandard level of performance while on active duty, the previous corrections constitute the full and proper extent of any correction to his record that was (or is) warranted. For all these reasons, the applicant has failed to prove any material error or injustice, and the Board should deny each and every contention put forth in Counsel's petitions for relief.

A complete copy of the AFPC/JA evaluation is at Exhibit AE.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Counsel argues the primary issue of the applicant's case has always been whether he was properly discharged. The Air Force attempt at preparing officer selection records (OSR) for three additional rating years after the applicant was wrongfully discharged excludes an accounting for the applicant's missed opportunities (the amassing and recording of three years of practice accomplishments). The Air Force now wishes to portray those three years as having been on active duty without ratings being conducted and not insulate the applicant from being the object of blame for the absence of the ratings. Five and one-half undocumented years outside of clinical practice compared to six documented months of clinical work does not allow the fair portrayal of an Air Force officer and physician. Title 10 USC 628 requires that an SSB shall consider the record of an officer as his record, if corrected, would have appeared to the board

that considered him. The courts have upheld the OSR documents sent to a selection board must be substantially complete and must fairly portray the officer's record, which has not happened in the applicant's case. Only the Air Force is accountable for the lack of OSR documents after 27 Nov 97. Only the Air Force is responsible for showing cause as to why the applicant did not receive full and unrestricted privileges in Family Practice and Flight Medicine. The burden of proof has shifted to the Air Force to show that its errors were harmless, i.e. could not have contributed to the applicant's promotion/continuance rejections.

The Air Force has denied itself the opportunity to objectively critique the applicant's performance. Its assessments of him now can only be judged as speculative, being unable to produce firm evidence that he would not have been advanced in rank or continued. The problem with speculation is where do you draw the line? Decisions based upon speculation are arbitrary and capricious. The applicant has provided clear and convincing evidence that his OSR remains incomplete and irreparable. The fault belongs to the Air Force and the record will never portray the applicant fairly and precludes the use of it by any regular or special selection boards convened to determine whether or not he would have been promoted or selected for continuance in comparison to his peers.

While the Court agrees with the AFPC/JA position that the burden of proof to establish an error or injustice is on the applicant, the Air Force provided such proof of material legal error when it uncovered the 25 Nov 97 abeyance order, which was "either not conveyed or not complied with," and separated the applicant prematurely. Had the abeyance order been followed and the applicant not been wrongfully discharged and excluded from active duty pursuits, there is no evidence to indicate that he would not have become a rated flight surgeon, attended Air Command and Staff College, or been assigned overseas, given the opportunity to do so. As such, the lack of information and misinformation concerning his clinical and officer duty assignments during 1998, 1999, and 2000, as reflected in the respective years' constructed officer selection records (OSR), is materially unfair, unjust, and the direct result of his wrongful discharge.

In addition, the applicant's chances for selection or continuation were further prejudiced by the arbitrary manner in which Air Force officials decided to constitute the membership of the contested boards, as well as the manner in which they decided to construct his OSRs which met these boards. As for the composition of the 1998 and 2000 SSBs, while the AFPC/PB evaluation provides a hypothetical scenario wherein a single board panel reviews three promotion years as being consistent with the standard process used by the Air Force for over thirty years, whether or not this practice has been challenged before is unknown and is irrelevant to the intent behind a clearly worded law and the misinterpretation by the Air Force. The Air Force is out of compliance with 10 USC 612(b).

Counsel reiterates his argument the Air Force failed to deliver fair, complete, and equitable OSRs. The PRFs which met the contested promotion and selective continuation boards were not completed by the authorized senior raters in accordance with AFI 36-2406, *Officer and Enlisted Evaluation Systems*. An officer serving on active duty has only one Senior Rater at a time, yet officials chose three separate rating officers to write three separate PRFs destined for three separate SSBs representing three separate Central Selection Boards. This was an arbitrary decision made by Air Force officials and not supported by governing AFI. Additionally, while Air Force officials chose the Senior Raters under the assumption the applicant would have remained at Grand Forks AFB, there is evidence that plans were underway to move the applicant from Grand Forks prior to the CY1997A lieutenant colonel promotion board. Had the applicant not been erroneously discharged, he would have been moved from Grand Forks AFB according to documents received from a Freedom of Information Act (FIOA) request. While it can only be speculated where the applicant would have ended up were it not for his wrongful discharge, it is certain that he would not have been at Grand Forks AFB. Accordingly, the Senior Raters who authored the contested PRFs were incorrectly identified.

Addressing the nearly blank and prejudicial OSBs, while AFPC contends they were correctly constituted based on the applicant's record, there is no evidence to indicate the applicant would not nor could not have completed ACSC, become a rated flight surgeon, or been assigned overseas prior to the CY2000A board had he not been wrongfully separated. What is certain is that he would not have been consigned to the Health and Wellness Center (HAWC) as a clerk during 1998, 1999, and 2000 as reflected in his reconstructed PRFs and OSBs.

As for the AF Forms 77 included in the OSRs, AFPC acknowledges they were worded incorrectly, but indicates the wording used did not change the meaning or content of the AF Forms 77. By deviating from its own established instructions, the Air Force places the burden of proof on itself to show that altering the words as prescribed by its instructions, did not, or will not, preclude promotion board members from rendering an erroneous decision concerning the applicant's promotability.

As for the applicant's receipt of full and unrestricted practice privileges, it is illogical to conclude the absence of his clinical appraisal at whatever station he was sent to, subsequent upgrade to full and unrestricted privileges, and medical practice results from 1998, 1999, and 2000 from his OSR, did not have a negative impact on the respective board panel members and contributed to his nonselection for promotion and continuation.

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 an error or injustice. The applicant's complete submission, including his response to the Air Force evaluations, was thoroughly reviewed and his contentions duly noted; however, in our view, the Air Force offices of primary responsibility (OPR) have conducted a thorough review of the evidence of record and addressed the issues presented by the applicant and we are in agreement with their opinions and recommendations. As a result of the Board's previous determinations, the applicant's 26 Nov 97 discharge for substandard performance was set aside and his record was corrected to reflect he was discharged on 30 Jun 98 for being non-selected for promotion. Subsequent requests for correction of his records resulted in him being afforded SSB consideration for the CY1996A and CY1997A lieutenant colonel promotion selection boards, with the CY1997A SSB also serving as a selective continuation board. While he was not selected for promotion, he was selected for continuation and his records were corrected to reflect he was continued on active duty until 31 Jul 01. He was offered the opportunity to apply for reinstatement, but instead determined to accept continuation in order to proceed with further SSBs. He subsequently requested and was provided SSB consideration for the CY1998A, CY1999A, and CY2000A lieutenant colonel promotion selection boards, with the CY2000A SSB also serving as a selective continuation board, for which he was not selected.

Although a beneficiary of this established process, Counsel now argues the applicant should be reinstated and directly promoted to the grade of general (O-10), contending that his Officer Selection Record (OSR) is irreparably incomplete and the fault belongs to the Air Force. We disagree. While Counsel disputes the membership of the CY1998A and CY2000A SSBs and argues they violated the intent of 10 USC 612(b), as they constituted "successive" boards, we are not persuaded by counsel's arguments and note the comments of AFPC/PB indicating it is not uncommon and entirely proper and consistent with Title 10 for an officer's record to be considered in alternate years during the same session of SSBs using the same board members. We accept their view and find no basis to conclude the applicant did not receive fair and equitable consideration by these contested boards. Therefore, in the absence of evidence the applicant was treated differently than others similarly situated and that a clear violation of policy or statute has occurred, we find no basis to question the membership of the contested SSBs.

Counsel also argues the PRFs which met the contested SSBs should be declared as invalid as they were authored by officers selected on the incorrect premise the applicant would have remained at Grand Forks AFB had he not been discharged. In our view, it was reasonable to have the PRFs prepared by the officers selected. There is no basis to conclude the PRFs rendered were not a fair assessment of the applicant's potential to serve in the higher grade. While Counsel provides copies of email traffic indicating that command officials intended to reassign the applicant to another installation prior to the matter under review, he concedes that one can only speculate as to where the applicant would have ended up had he remained on active duty.

Regarding Counsel's contention that an erroneous statement included on the AF Forms 77 that met the contested boards precluded the applicant from receiving full and fair consideration for promotion, we are not persuaded. In our view, the noted error was harmless and the evidence is insufficient to conclude the error had a material impact on the applicant's consideration for promotion. In this respect, we note the comments of AFPC/DPSID indicating that while the wording used was not the exact wording prescribed in AFI 36-2406, it did not change the meaning or content of the AF Forms 77. We agree.

Counsel further contends the applicant's records have yet to reflect his receipt of full and unrestricted practice privileges in his medical specialties in accordance with AFI 44-119, *Medical Quality Operations*; however, other than his own assertions, Counsel provides no evidence to indicate that our previous determination on this point was erroneous. To the contrary, the evidence of record clearly indicated the revocation of his practice privileges had a basis in obvious problems with patient care. Therefore, our view remains that said revocation did not constitute an error or injustice.

As for Counsel's argument the Air Force needs to explain why certain blocks on the Officer Selection Brief (OSB) are blank or reflect incomplete information, we direct Counsel's attention to the evaluation authored by AFPC/DPSOO for the requested explanation and agree with their determination the OSB's were correctly constructed based on the applicant's underlying military personnel records. We note Counsel's contention in response to this evaluation that there is no evidence to indicate the applicant would not have completed ACSC, become a rated flight surgeon, or been assigned overseas prior to the CY2000A board had he not been wrongfully separated. However, there is also no evidence to the contrary and these assertions, in our view, are extraordinarily speculative, and speculation is no basis for us to recommend fabricating an OSB, or recommending other changes to the record, which have no basis in fact.

Counsel also contends the lack of corrections to the OPRs rendered for the periods ending 14 Aug 96 and 14 Aug 97, and the lack of any follow-up reporting on the applicant's duty

performance, is prejudicial to the applicant and makes his service appear substantially worse than it would have been had the applicant not been discharged. However, again, counsel sets forth an argument based on speculation of what the applicant's record would have looked like had he continued to serve on active duty. Counsel has presented no evidence that corroborates that the applicant's service, were it not for his discharge, would have been sufficiently meritorious to warrant his selection for promotion to a higher grade. In fact, the evidence of record indicates the opposite. While this Board's recommendation to provide the relief previously rendered was attributable to a technical flaw in the applicant's discharge, the Board has always held the view that his records appropriately reflect that he was a marginal performer while he was on active duty and it was this substandard performance which has led to the outcomes he contests.

Finally, Counsel argues that it is impossible for the applicant to receive full and fair consideration for promotion or continuation by SSB because the applicant's erroneous 1997 discharge makes it impossible to constitute an accurate, fair, and comprehensive officer selection record (OSR) due to the fact he was erroneously discharged. We disagree. The merits of the established promotion process outweigh his arguments and should be given priority in our determination of what is full and fitting relief. We note this is in keeping with the Board's actions in previous cases of this type and have found that numerous officers who have voids in their records have successfully competed for promotion through the SSB process. Furthermore, we note the applicant was offered an opportunity to request reinstatement to active duty, but instead elected continuation and further SSB consideration. Thus it appears his actions contributed greatly to the predicament he now finds himself and is the primary reason he has not received the performance reports and clinical assessments he indicates are so critical to him receiving full and fair consideration for promotion/continuation. Additionally, had he chosen to be reinstated to active duty, based on actions in cases of similar circumstances, we could have considered providing further corrective action that would have allowed him the opportunity to build a competitive officer selection record. Instead, the applicant made a deliberate decision to choose continuation and further SSB consideration over reinstatement, thus depriving the Air Force of the ability to evaluate his performance and clinical abilities. He now argues the Air Force is at fault for what Counsel describes as a "prejudicial vacuum" in the applicant's record which precludes its use by any regular or special selection boards. We find this argument disingenuous and are not convinced that his nonselections for promotion and continuation were based on anything other than what appears to be documented poor duty performance while he served on active duty and his subsequent decision to elect continuation without reinstatement.

Therefore, in view of the above and after a lengthy and thorough consideration of the documentation, statements, and contentions presented throughout this more than ten-year debate regarding the applicant's discharge, we believe the applicant has been provided full and fitting relief in the aftermath of his discharge and find no basis to recommend any relief beyond that previously rendered.

THE BOARD DETERMINES THAT:

The applicant be notified the evidence presented did not demonstrate the existence of probable material error or injustice; and 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 AFBCMR Docket Number BC-2001-04750 in Executive Session on 28 Nov 11, under the provisions of AFI 36-2603:

Mr. XXXXXXXXXXXX, Vice Chair
Mr. XXXXXXXXXXXX, Member
Mr. XXXXXXXXXXXX, Member

The following documentary evidence pertaining to AFBCMR Docket Number BC-1999-02707 was considered:

- Exhibit W. Memorandum for the Chief of Staff and Addendum to Record of Proceedings, dated 12 Oct 04, w/Exhibits.
- Exhibit X. Letter, Applicant's Counsel, dated 22 Dec 09, w/atchs.
- Exhibit Y. Orders of the US Court of Federal Claims, dated 7 May 10 and 7 Jun 10.
- Exhibit Z. Letter, AFPC/DPSID, dated 29 Apr 11.
- Exhibit AA. Letter, AFPC/DPSOO, dated 13 Jun 11.
- Exhibit AB. Letter, AFPC/PB, dated 30 Jun 11.
- Exhibit AC. Letter, AFPC/DPSOS, dated 7 Sep 11.
- Exhibit AD. Letter, AFMOA/SGHQ, dated 6 Oct 11.
- Exhibit AE. Letter, AFPC/JA, dated 12 Oct 11.
- Exhibit AF. Letter, AFBCMR, dated 14 Oct 11.
- Exhibit AG. Letter, Applicant's Counsel, dated 23 Nov 11, w/atchs.

XXXXXXXXXX
Vice Chair

