

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: BC-2012-00029
COUNSEL: NONE
HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

He be promoted to the grade of major (O-4) with a date of rank (DOR) commensurate with the 1982 United States Air Force Academy (USAFA) year group with all appropriate back pay and allowances.

APPLICANT CONTENDS THAT:

The selection board illegally used the lack of a Master's Degree on his record as an absolute requirement and definitive deciding factor to eliminate his record without equal, fair, and unbiased evaluation amongst his peers on merit of his promotion record. The entire board did not consider his record in accordance with Title 10, United States Code (USC), Section 616(c); and, the board violated the finding, certification, and report requirements of Federal Statute Title 10, USC, Section 617.

In support of his appeal, the applicant provides a copy of a Class Action Complaint against the United States by former officers of the United States Air Force (USAF) and on the behalf of others similarly situated.

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

STATEMENT OF FACTS:

The applicant is currently serving in the Air National Guard on an active duty tour in the rank of major (O-4). While earlier serving in the Regular Air Force, he was considered and nonselected for promotion to major by the Calendar Year 1992C (CY92C) (Below the Primary Zone), CY93B (In the Primary Zone), and CY94A (Above the Primary Zone) promotion selection boards. The Memorandum of Instruction (MOI) used at these boards included language that cautioned the board members to use the "whole person concept" in assessing factors like advanced education and to not give disproportionate weight to the mere fact that an officer had completed advanced education.

The remaining relevant facts, extracted from the applicant's military service records, are contained in the evaluations by the Air Force offices or primary responsibility at Exhibits C and D.

AIR FORCE EVALUATIONS:

AFPC/PB recommends denial. PB states the applicant offers absolutely no proof of his claim that the board used the lack of a Master's Degree as an absolute requirement and definitive deciding factor to eliminate his record. The Secretary of the Air Force (SECAF) MOI for each board contains clear guidance regarding the treatment of advanced academic education. A review of the statistical summary involving selection rates from these boards reflects a significant number of officers promoted with no advanced degrees. In fact, over 60 percent (545 of 903) of officers without advanced degrees were selected for promotion to major on the CY93 board (his "In the Primary Zone" consideration). The promotion boards complied with all governing directives and SECAF guidance. There is absolutely no evidence to support his claim.

The complete PB evaluation, with attachments, is at Exhibit C.

AFPC/JA recommends denial. JA states they recommend this application be denied as untimely. The promotion boards about which the applicant complains occurred some 18-20 years ago. He states that the discovery of his claim is 5 January 2011, yet he offers no explanation as to how or why he picked that date. They submit he probably picked that date as the time when he was provided the theory and "evidence" he has offered. The applicant obviously knew about the outcome and procedures used at his promotion boards at the time they were held, or at least he could have known had he bothered to seek information at that time. The law is clear that ignorance of the factual or legal basis of a claim is no bar to application of a limitation period. Nor is the fact that within the statutory period for filing, the claimant may have had no theory to support the alleged claim until provided by some other person(s). Absent any explanation whatsoever as to why the applicant waited so long to file his application or why the AFBCMR should find it in the interest of justice to waive the three-year filing requirement, they strongly urge the Board to deny this application as untimely.

In regard to the merits of this case, the applicant has failed to provide material evidence of any error or injustice. As noted by AFPC/PB in its advisory, the applicant has offered no evidence to support his first allegation regarding the lack of a Master's Degree in his record, notwithstanding that the burden of proof in a BCMR application is on the applicant to prove a probable error or injustice. The PB advisory also explains the MOI used at the challenged promotion boards rebut the applicant's claim.

In support of his second allegation (that his promotion boards were held in violation of Sections 616 and 617 of Title 10, (USC), the applicant offers an undated brief in support of a class action complaint against the United States that was apparently filed with the United States Court of Federal Claims. The applicant offers no explanation as to how or why this brief constitutes evidence of any error or injustice in his promotion selection boards. In addition, had the applicant searched a little harder, he would have discovered that the provided lawsuit was dismissed by the Court of Federal Claims, which held the Air Force promotion system does not violate governing statutes (to include Title 10, USC, Sections 616 and 617) or Department of Defense regulation.

It is JA's opinion that the Board should deny the applicant's request as untimely; however, if the Board waives the untimely filing and considers the application on the merits, the applicant has failed to offer any evidence of a material error or injustice.

The complete JA evaluation, with attachments, is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATIONS:

Copies of the Air Force Evaluations were forwarded to the applicant on 27 March 2012, for review and comment within 30 days (Exhibit E). As of this date, this office has received no response.

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 an injustice. We took notice of the applicant's complete submission in judging the merits of the case; however, we agree with the opinions and recommendations of the Air Force offices of primary responsibility and adopt their rationale as the basis for our conclusion 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 issues 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 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 AFBCMR Docket Number BC-2012-00029 in Executive Session on 31 July 2012, under the provisions of AFI 36-2603:

Panel Chair
Member
Member

The following documentary evidence was considered in connection with AFBCMR Docket Number BC-2012-00029:

- Exhibit A. DD Form 149, dated 22 Dec 11, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFPC/PB, dated 7 Feb 12, w/atchs
- Exhibit D. Letter, AFPC/JA, dated 29 Feb 12, w/atchs
- Exhibit E. Letter, SAF/MRBR, dated 27 Mar 12.

Panel Chair