

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: BC-2012-00031

COUNSEL:

HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

He be considered for promotion to the grade of lieutenant colonel (Lt Col) by Special Selection Board (SSB) for the Calendar Year 1997C (CY97C) and CY98B Lieutenant Colonel (Lt Col) Central Selection Boards (CSBs).

APPLICANT CONTENDS THAT:

The selection boards that he was considered under were given a Memorandum of Instruction (MOI) which unconstitutionally discriminated against him by favoring the records of minority and female officers. He implies that this instruction contributed to his non-selection for promotion to the grade of Lt Col and ultimately led to his retirement in the grade of major.

In support of his appeal, the applicant submits a brief through counsel; copies of his DD Form 214, *Certificate of Release or Discharge from Active Duty*, issued in conjunction with his 30 Nov 07 retirement from active duty; Promotion Recommendation Forms (PRFs), and an affidavit.

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

STATEMENT OF FACTS:

The applicant served in the Regular Air Force from 18 Nov 83 through 30 Nov 07. He was progressively promoted to the grade of major, with an effective date and Date of Rank (DOR) of 1 Nov 95.

The applicant was considered and nonselected for promotion by the CY97C and the CY98B Lt Col Line CSBs which convened on 21 Jun 97 and 1 Jun 98, respectively.

The applicant was relieved from active duty and retired, effective 1 Dec 07. He was credited with 24 years and 13 days of active duty service.

THE AIR FORCE EVALUATION:

AFPC/DPSOO recommends denial, stating, in part, that they strongly recommend the Board find that it would not be in the interest of justice to excuse the delay, and deny the application as untimely. They note the fact that previous cases may have been approved should not be used as precedence for any future cases.

In addition, they note that the applicant contends the promotion board instructions contained an illegal and constitutionally impermissible instruction that gave unfair advantage to women and minorities (*Berkley, et al., v. United States*, United States Court of Appeals for the Federal Circuit, Docket No. 01-5057). The MOI provided to CSBs convened between Jan 90 and Jun 98 did contain the same equal opportunity (EO) clause and may have harmed officers meeting these boards. Therefore, the applicant's request for the CY97C Lt Col board is the only board that does fall under the *Berkley* decision.

The errors claimed by the applicant occurred during promotion boards conducted in 1997 and 1998. The applicant obviously had no theory for claiming relief until it was provided for him by another Air Force officer. Nevertheless, the law is clear that ignorance of the factual or legal basis of a claim is no bar to application of a limitations period. The alleged ignorance of the existence of a claim is not enough to toll a statute of limitations. Nor is the fact that a claimant previously had no counsel, or an articulable theory provided by some counsel to support an alleged claim.

The complete AFPC/DPSOO evaluation is at Exhibit C.

HQ USAF/JAA recommends the applicant's request be denied as untimely.

They note, though the applicant's case otherwise falls within the realm of *Berkley*, they recommend that his application be denied as untimely. AFI 36-2603, *Air Force Board for Correction of Military Records*, implements the three-year limitations period established by 10 U.S.C. § 1552(b) and further specifies that it runs not just from discovery of the error or injustice, but from the time at which, with due diligence, it should have been discovered. An application filed later is untimely and may be denied by the Board for that reason. Although the Board may excuse an untimely filing in the interest of justice, the burden

is on the applicant to establish why it would serve the interests of justice to excuse the late application.

In this case, the applicant filed his request for a special selection board on 29 Dec 11, over 14 years after he met the CY97C Lt Col Line CSB. In his statement dated 29 Dec 11, he pleads ignorance of his potential claim until early 2011; however, neither he nor his counsel provides explanation as to why the issue was not discoverable through the exercise of due diligence before 2011. The applicant had the ability and resources, with the exercise of due diligence, to discover the error or injustice of which he now complains. Rather than being subject to involuntary separation as a result of his non-selection for promotion, the applicant continued to serve until his retirement. He was not estranged from the Air Force community; he had access to processes, policies, and developments while serving as an active part of the Air Force community for an additional ten years after the CY97C Lt Col Line CSB. When balancing the interests of justice, it is notable that the MOI with the objectionable clause was used in only one of the applicant's boards-his two years below the zone board. After the CY97C Lt Col Line CSB, the applicant met a one year below the zone board, an in the promotion zone (IPZ) board, and several above the promotion zone (APZ) boards. Therefore, the applicant's military records were reviewed, and he was considered for promotion, numerous times following his non-selection at the CY97C Lt Col Line CSB. MOIs without the EO clause were provided at each of these boards, and the applicant was non-selected for promotion to the grade of Lt Col at each of these boards.

The complete AF/JAA evaluation is at Exhibit D.

APPLICANT'S REVIEW OF THE AIR FORCE EVALUATION:

Through counsel, the applicant notes that JAA argues the applicant did not exert due diligence in discovering the error. It should be noted the applicant has done nothing wrong in this case. He served his country faithfully and was wronged when unconstitutional instructions were given to his promotion board. The only question is whether the applicant's filing ten years after the final decision in *U.S. Berkley*, 287 F.3d 1076 (Fed. Cir 2002) overcomes the harm done to him by the Air Force. The Board granted relief in several similar cases filed in 2007 and later. The Board recently granted relief in BC-2011-01859, a similar case filed in 2011. The time delay in the applicant's case is not so great so as to warrant depriving him of a remedy. Additionally, the applicant remained on active duty until 30 Nov 2007. His three year window to file began upon his retirement. Therefore, his application is less than five years

after he left active duty. This is well short of the time lapse in other cases in which this Board had granted relief.

JAA also argues that the fact the applicant met other promotion boards that were not tainted by the improper instructions negates the impact of the improper board. The fact the applicant met later boards does not take away the taint of the prior improper board. However, he should have a fair chance at promotion at all boards regardless of what occurred in subsequent promotion boards. Also, they note that DPS00 has stated that the improper language was only read to the CY97C promotion board. If that is the case, then the applicant requests a SSB for the CY97C board only. DPS00 also recommends the applicant's request be denied because it is untimely. They acknowledge the applicant "obviously had no theory for claiming relief until it was provided for him by another Air Force officer." The applicant has stated that he had no knowledge of the matter until he was apprised of the issue by that officer. If the Board should find that the application is untimely, we request that the Board hear the case in the interests of justice.

The applicant's counsel complete response is at Exhibit F.

FINDINGS AND CONCLUSIONS OF THE BOARD:

1. After careful consideration of the applicant's request and the evidence of record, we find the application untimely filed. The applicant did not file within three years after the alleged error or injustice was discovered, as required by Title 10, United States Code, Section 1552 and Air Force Instruction 36-2603, nor has he shown a sufficient reason for the delay in filing. The applicant contends he only recently learned of the irregularities with the MOI used by promotion boards and that it would be unreasonable to expect him to be aware of the problems with the Equal Employment Opportunity (EEO) language contained in the MOI before it was found to be unconstitutional. However, the Air Force settled the *Berkley* case 10 years ago and the applicant has not demonstrated the error was not discoverable, or that after his exertion of reasonable due diligence, it could not have been discovered in a reasonable time. In this respect, we note that during the settlement in the *Berkley* class-action litigation, the Air Force went to great lengths to implement a widely publicized campaign to attempt to notify affected individuals of their opportunity to join the class-action suit. Moreover, given the magnitude of the settlement agreement and its far-reaching, resultant impact on such a large cadre of officers, it was widely publicized through a number of nonofficial websites on the internet. In view of this, we find it unreasonable to believe that despite extraordinary measures

to advise affected members, that he would be unaware of the opportunity to join the class-action suit or the subsequent settlement agreement until some 10 years later. At a minimum, there has been no showing that, through due diligence, he would not have become aware of these actions years earlier.

2. We are also not persuaded the record raises issues of error or injustice which require resolution on the merits. While the improper MOI may have been a material error in the promotion selection process, we cannot determine the applicant's promotion non-selections were in error, since we cannot determine that he would have been a selectee but for the use of the improper MOI. As this Board has noted on a number of occasions, officers compete for promotion under the whole person concept. Many factors are carefully assessed by selection boards and an officer may be qualified for promotion. However, in the judgment of a selection board vested with the discretionary authority to make the selections, a minimally qualified officer may not be the best qualified of those available for the limited number of promotion vacancies, nor do we believe the circumstances of this appeal at this late date make the applicant a victim of an injustice. In the past 10 years since *Berkley*, correcting a member's records has become increasingly more difficult due to the passage of time. It has become nearly impossible to provide an appropriate remedy since many members are provided supplemental promotion consideration and are selected for promotion in a somewhat more liberal process where promotion quotas are not applicable. As a result, many are retroactively promoted several years earlier and provided numerous years of constructive service for time they never served, to include periods when thousands deployed in support of military operations in Afghanistan and Iraq. Further, upon retroactive promotion, the majority of these officers re-petition the Board seeking direct promotion to at least the next higher grade, if not additional grades, requesting years of constructive service created as a result of their delay in seeking relief. We find that such action creates a greater injustice and an undue windfall in light of the many officers who *actually* served during these wartime years. Therefore, in the absence of evidence that the applicant would have been a selectee had an appropriate MOI been employed during his selection board, we do not find a sufficient basis to waive the failure to timely file and consider the case on its merits. This determination is made only after lengthy deliberation and exhaustive consideration of all of the issues involved, and our experience dealing with these cases for over a decade. We ultimately find that any alleged injustice cannot be effectively remedied through the correction of records process at this extremely late date. Thus, it would not be in the interest of justice to excuse the applicant's failure to file in a timely manner.

3. 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.

DECISION OF THE BOARD:

The application was not timely filed and it would not be in the interest of justice to waive the untimeliness. It is the decision of the Board, therefore, to reject the application as untimely.

The following members of the Board considered AFBCMR Docket Number BC-2012-00031 in Executive Session on 30 July 2012, under the provisions of AFI 36-2603:

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 29 Dec 11, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFPC/DPSOO, dated 31 Jan 12.
- Exhibit D. Letter, HQ USAF/JAA, dated 23 Feb 12.
- Exhibit E. Letter, SAF/MRBR, dated 24 Feb 12.
- Exhibit F. Letter, Counsel, dated 25 Mar 12.

Panel Chair