

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: BC-2012-00807
COUNSEL:
HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

His records be corrected to reflect the following:

a. Amend the Developmental Education (DE) section of his Officer Selection Brief (OSB) to show completion of Air Command and Staff College (ACSC) in-residence.

b. Amend his P0506A Promotion Recommendation Form (PRF) to reflect a "Definitely Promote (DP)" recommendation, or, alternatively, order his senior rater (SR) to reassess his record for consideration of a "DP" in light of the corrected record and submit his record for a new Management Level Review (MLR).

c. Amend the deployment history section of his OSB to include six deployments not previously listed.

d. Refer his corrected record to a Special Selection Board (SSB) for an in-the-zone promotion to the grade of lieutenant colonel (Lt Col).

APPLICANT CONTENDS THAT:

1. His selection as a Professional Military Education candidate by the CY01A Major Line of the Air Force (LAF) SSB comes approximately five years too late. Had he been selected by his original major's board he would have been able to compete for an in-residence seat at intermediate service school (ISS) until he reached his primary zone for Lt Col. He is well past his primary zone for Lt Col and ineligible to attend ISS in-residence. His current ineligibility, however, is no fault of his own as it is due to an error in his record at the time of his original major promotion board causing him to be passed-over for PME candidacy. This error, of course, has now been corrected and resulted in his selection for PME candidacy. Since he performed well within standards during the time he would have been eligible to attend ISS, it is likely he would have been selected to attend ISS during his eligibility period had his record been correct at his original promotion board. Given the circumstances, including his current time in the service and his ineligibility to now attend ISS, the only reasonable way to correct the injustice caused by the original board is to correct his military record to reflect completion of ISS in-residence.

2. The Air Force's PRF and "DP" selection process violates statutory and regulatory directives by unlawfully interjecting third-party opinion into the promotion selection process.

3. His OSB only included deployment history for 11 Oct 01 to 28 Nov 01. However, his records indicate six additional deployments: 9 Dec 96 to 23 Jan 97; 24 Mar 97 to 11 May 97; 13 Feb 98 to 20 Apr 98; 5 May 98 to 2 Jul 98; 8 Apr 99 to 3 Jun 99; and 6 Oct 99 to 8 Dec 99. His P0506A selection brief gives the false impression that he only deployed once in 2001, when in fact, he has deployed seven times.

4. He should be awarded a "DP" recommendation.

In support of his request, the applicant provides copies of an eight page legal brief, SSB results memorandum, extracted Air Force CY06A promotion results, Virtual Military Personnel Flight (vMPF) Personal Information Sheet, and a memorandum.

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

STATEMENT OF FACTS:

On 1 Apr 12, the applicant retired from the Air Force in the grade of major.

He had seven non-selections to the grade of Lt Col by the CY06A; CY06C; CY07B; CY08B; CY09B; CY10A, and CY11A Lt Col CSBs.

On 6 Aug 10, AFBCMR Docket Number BC-2009-01405 directed the applicant's records be corrected to show that:

a. His Officer Selection Brief prepared for consideration by the Calendar Year (CY06A) Lieutenant Colonel Central Selection Board (CSB), be amended in the "Decorations" section "NR AWD" column to reflect "4" rather than "3."

b. His records be considered by Special Selection Board for Intermediate Developmental Education (IDE) by the Calendar Year 2001A (CY01A) Major Line CSB.

c. His records, to include the corrected OSB and the Aerial Achievement Medal (AAM) (basic) citation for the period 15 Dec 96 to 6 May 97, be considered for promotion to the grade of Lt Col by an SSB for the CY06A Lt Col CSB.

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 through E.

AIR FORCE EVALUATION:

AFPC/DPAPF recommends an SSB be convened and the applicant's record be competed for an in-residence seat against officers actually selected for ISS during his eligibility window.

The applicant did not complete Air Command and Staff College (ACSC). Currently officers designated as "selects" from the major's promotion board will attend PME in-residence (formerly ISS) unless quality force indicators are present or the officer is deferred for operational reasons.

The governing guidance when the applicant met his major's promotion board was as follows: "to be eligible to attend ISS, majors and major selects must be selected as an ISS "candidate" or be nominated by their management level (ML) as a non-candidate to compete at the annual AFPC ISS Central Board. ISS candidacy is determined at the major's promotion board. Once designated as a "candidate", the officer can compete for ISS annually until no longer eligible. Candidates are no longer eligible once they are in their primary zone for Lt Col. The eligibility window for majors and major selects is at least three years.

It would be unfair to utilize current Air Force Instruction (AFI) rule sets for school selection to correct any past error in the applicant's record or selection for school. Once his record is fixed, it should be competed against a sampling of ISS attendees in the same eligibility window as the applicant via a SSB. Although the applicant was awarded "select" status by a previous SSB, selection to school was not a guarantee using the aforementioned ISS rule sets that were in place during his eligibility window. He would have had to compete for a seat each year he was eligible using rules in place in 2002.

If selected for IDE via this process, AFPC/DPAPFE can update his record to reflect he was selected for in-residence developmental education, but due to matters outside his control, he was not able to attend. Otherwise, due to the applicant not actually completing ACSC in-residence, AFPC/DPAPFE will not update his record to reflect such completion, unless a SSB selects him to attend school (not just candidacy).

The complete DPAPF evaluation is at Exhibit C.

AFPC/DPSID recommends denial of the applicant's request to change the promotion recommendation on the contested PRF.

The applicant did not file an appeal through the Evaluation Report Appeals Board (ERAB) under the provisions of AFI 36-2401, *Correcting Officer and Enlisted Evaluation Reports*.

The applicant received a "Promote" recommendation on the contested PRF and contends it was unjust. Specifically, he alleges that the non-selection for PME was driven by a missing decoration that, had it been in his record, it would have made the difference in successful selection for in-residence PME and furthermore, the in-residence PME completion could have resulted in a "DP" recommendation on the PRF, which then could have ultimately resulted in being selected to the grade of Lt Col at the P0506A CSB.

DPSID states the applicant had ample time and opportunity prior to and after the subject MLR to correct his decoration record and address the lack of in-residence school completion; and more importantly, address these concerns with the SR. The applicant is only now, once his enforced mandatory date of separation from the Air Force is drawing near, attempting to rectify this perceived error.

The applicant has not provided any proposed substitute PRF and accompanying justification memorandum from the SR and MLR Board President, justifying the error/injustice and the need for correction of the existing valid PRF. In accordance with (IAW) AFI 36-2401, it states: changing the overall recommendation (section IX) to a "DP" rating must be fully justified and requires the concurrence of both the SR and MLR President.

Additionally, DPSID contends the SR completed the existing PRF IAW all Air Force policies and procedures and was within the regulatory Air Force requirements. Although the applicant may feel that this was an injustice, there were avenues he could have taken at the appropriate timeframe to ensure that any relevant issues were addressed and taken care of in advance of the subject CSB in which he was not selected for promotion. Therefore, DPSID contends that to arbitrarily change the promotion recommendation at this late date would be an injustice to other commissioned officers which have properly screened their own records in a timely manner, corrected any discrepancies and earned the appropriate promotion recommendation prior to their own applicable CSBs.

An evaluation report is considered to represent the rating chain's best judgment at the time it is rendered based on all known or provided performance information. Once a report is accepted for file only strong evidence to the contrary warrants correction or removal from an individual's record.

The burden of proof is on the applicant. He has not substantiated the contested PRF was not rendered in good faith by the SR based on knowledge available at the time and has not

proven that substitution of the contested PRF for the reason provided is warranted or justified.

The complete DPSID evaluation is at Exhibit D.

AFPC/DPSOO does not provide a recommendation regarding the applicant's request to amend the deployment history section on his OSB to include six additional deployments.

The Military Personnel Flight Memorandum (MPFM), dated 11 Oct 05 states that only Type 1 Contingency/rotational or Type 2 Exercise Deployments of 45 days or more and with a start date of 11 Sep 01 or later will be displayed in the deployment history section of the OSB. As such, the applicant's six additional deployments from 1996 to 1999 do not qualify to be reflected on the OSB for the promotion selection process.

The complete DPSOO evaluation is at Exhibit E.

AFPC/JA recommends denial of the applicant's first three requests:

JA states as noted by AFPC/DPAPF there is no process in place to "do over" an in-residence service school selection. Even if there were, the passage of time has resulted in the destruction of records that would likely have been used. Notwithstanding, they do not believe the applicant has been unfairly prejudiced by the inability of the Air Force to now conduct a new consideration for in-residence service school - or to just award him an ISS completion certificate. The DPSOO and DPAPF advisories have made clear that selection for service school - even in the face of a strong endorsement - was not a sure thing. On the contrary, DPAPF points out that during the applicant's eligibility window, there was no guarantee that an officer who was a candidate for school would ultimately be selected to attend school in-residence.

Counsel's belief the applicant was a sure bet to be selected is just that - a belief- nothing more than speculation, with no evidence to support it. Moreover, even if the applicant were somehow now selected, he could not attend the service school. Under these circumstances it would constitute an undeserved windfall to give the applicant credit in his record for completing an in-residence service school that he never attended, let alone completed. Even if the applicant had completed in-residence ISS, it would not have guaranteed promotion as it constituted just one of multiple factors utilized in the whole person concept.

In his next assignment of error, applicant's counsel argues that six deployments were improperly left off his selection brief. However, DPSOO has properly advised such deployments did not qualify to be reflected on the selection board brief.

The applicant's attorney contends that PRFs represent command level opinions as to which officers should be promoted, which are not authorized by either governing statutes or DoD regulations. In essence, he states that the Air Force's promotion recommendation process is an *ultra vires* procedure that unlawfully interjects third-party opinion into the promotion process in direct contradiction to Congress' clear intent, thus unlawfully usurping the statutory duty of the promotion board to review, weigh and rank each officer's record and determine who is best qualified.

The information that may be provided to members of a promotion selection board is governed by statute, DoD and Air Force instruction. Section 615 of Title 10, United States Code (U.S.C.), sets out the statutory guidance for information that may be furnished to selection boards.

The Air Force regulation that implements these provisions of DODI 1320.14 is AFI 36-2501, *Officer Promotions and Selective Continuation*. Paragraph 2.11 outlines what information may be provided to an officer promotion selection board. That paragraph includes the Officer Selection Record, outlined in AFI 36-2608, *Military Personnel Records System*, of each eligible officer, including the OSB. AFI 36-2608, paragraph 2.11.1., table A2.1, *Management of Records Document*, rule 85, lists the Air Force Form 709, *Promotion Recommendation*, as a document to be filed in the officer's OSR. Consequently, contrary to applicant's counsel's unsupported assertion, inclusion of the PRF in an officer's selection record is fully authorized under the governing statute (10 U.S.C. 615), DoD instruction (DODI 1320.14), and Air Force instructions (AFI 36-2501 and 36-2608). Moreover, such information is used to assist officer selection boards in their statutory duties, and in no ways does it usurp those duties.

Having argued that the Air Force's promotion recommendation process and the use of the "DP" is unlawful, the applicant's counsel then turns around and requests that applicant now be awarded a "DP." Notwithstanding the inconsistency of such an argument in light of his previous contention, the applicant's counsel essentially relies on a distorted "logic" to establish his conclusion. It depends entirely upon the use of pure speculation as a basis to engage in further speculation, rather than relying on statements of fact supported by a preponderance of evidence. Counsel says that "given the importance of in-residence PME it stands to reason that a substantial percentage, if not the vast majority, of those with in-residence PME were awarded "DPs" by their senior raters or MLRs. It can thus be concluded that the applicant's corrected PME status would materially influence the senior rater's decision to award a "DP" recommendation." He then concludes that the applicant's in-the-zone Lt Col PRF should be corrected to reflect a "DP" recommendation and that his corrected record should then be put before a new Lt Col SSB. As noted, this entire request is based on unsupported conjecture and what counsel believes "stands to

reason." Not only has the applicant's counsel failed to establish a factual basis to change applicant's record to reflect completion of an ISS course he never took, he then uses this presumptive "ACSC" completion" as the sole basis to argue that the applicant should be awarded a "DP" recommendation.

The complete JA evaluation is at Exhibit F.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant through counsel objects to certain comments contained in the advisory opinion of AFPC/DPSID, as well as the timeliness of the letter forwarding this and other advisory opinion.

Counsel states the applicant submitted his application within one year of the supplemental board decision that established his PME candidacy.

The MLR met in late 2005 and the original selection board met in Mar 2006. The missing decoration, however, was not discovered until 2009, when he was notified by AFPC that his first Aerial Achievement Medal (AAM) neither was presented to him nor reflected in his record. This decoration was a subject of the applicant's prior and timely request to this Board for correction of his record to include this decoration (BC-2009-01405). This Board granted that request on 6 Aug 10, and ordered a supplemental board, the results of which were not released until 5 Aug 11.

AFPC/DPSID states that "the applicant is only now, once his enforced Mandatory Date of Separation of service from the Air Force is drawing near, attempting to rectify this perceived error." This statement not only ignores the actual facts of the applicant's case, but relies on no more than mere conjecture in an attempt to assign a motivation to the applicant's pursuit of this application. In fact, the applicant was voluntarily extended to serve 23 years, but voluntarily decided to retire upon reaching 20 years of service.

Counsel's complete submission, with attachments, is at Exhibit H.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely not timely filed; however it is in the interest of justice to excuse the failure to timely file.

3. Insufficient relevant evidence has been presented to demonstrate the existence of error or injustice regarding the applicant's request to amend the deployment history section of his Officer Selection Brief (OSB). As pointed out by DPS00, in accordance with MPFM 05-39, dated 11 Oct 05, only Type 1 Contingency/rotational or Type 2 Exercise Deployments of 45 days or more and with a start date of 11 Sep 01 or later will be displayed in the deployment history section of the OSB. Therefore, we agree with the opinion and recommendation of AFPC/DPS00 and adopt its rationale as the basis for our conclusion that the applicant has not been the victim of an error or injustice. In view of the above and in the absence of evidence to the contrary, we find no basis to recommend granting this portion of the relief sought in this application.

4. Notwithstanding the above, sufficient relevant evidence has been presented to demonstrate the existence of an error or injustice to warrant partial relief regarding the applicant's request to amend the Development Education (DE) section of his Officer Selection Brief (OSB). While the applicant has requested that the DE section of his OSB be amended to show completion of ACSC in-residence, and DPAPF recommends his record compete for an in-residence seat against officers selected for ISS during his eligibility window, we believe it would more appropriate to correct his record to show that he was selected for in-residence PME and could not attend due to circumstances beyond his control. With respect to his request to amend his PRF, since we are recommending his OSB be changed, we believe reassessing the applicant's records for a "DP" recommendation and submitting it to a new Management Level Review (MLR) is warranted. Therefore, in the interest of justice we recommend his record be corrected as indicated below.

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. The Developmental Education section of his Officer Selection Brief be corrected to show that he was selected for in-residence PME but could not attend due to circumstances beyond his control.

b. His records be reassessed by the original Senior Rater for a "Definitely Promote" recommendation and if determined to be appropriate, submitted to the original Management Level Review for concurrence.

It is further directed that the corrected record be considered for promotion to the grade of lieutenant colonel by a Special

Selection Board (SSB) for the Calendar Year 2006A (CY06A)
Lieutenant Colonel Central Selection Board (CSB).

The following members of the Board considered AFBCMR Docket Number BC-2012-00807 in Executive Session on 24 Oct 12 under the provisions of AFI 36-2603:

Panel Chair
Member
Member

The following documentary evidence pertaining to AFBCMR Docket Number BC-2012-00807 was considered.

- Exhibit A. DD Form 149, dated 9 Feb 12, w/atchs.
- Exhibit B. Applicant's Master Personnel Record.
- Exhibit C. Letter, AFPC/DPAPF, dated 27 Mar 12.
- Exhibit D. Letter, AFPC/DPSID, dated 21 May 12.
- Exhibit E. Letter, AFPC/DPSOO, dates 14 Jun 12, w/atchs.
- Exhibit F. Letter, AFPC/JA, dated 9 Jul 12
- Exhibit G. Letter, SAF/MRBR, dated 17 Jul 12.
- Exhibit H. Letter, Applicant, dated 16 Aug 12, w/atchs.

Panel Chair