

RECORD OF PROCEEDINGS  
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: BC-2012-02037  
COUNSEL:  
HEARING DESIRED: NO

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APPLICANT REQUESTS THAT:

1. His AF Form 709, *Promotion Recommendation Form* (PRF) written for the CY10A Lieutenant Colonel (Lt Col) Line of the Air Force (LAF) Central Selection Board (CSB) be substituted with the newly signed PRF he provides.
  2. His corrected record receive Special Selection Board (SSB) consideration by the CY10A Lt Col LAF CSB.
  3. He be selectively continued and reinstated to active duty.
  4. The Board finds that the SECAF violated DOD 1320.08 by changing the 6 year protective window to a 5 year protective window.
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APPLICANT CONTENDS THAT:

1. The Evaluation Reports and Appeals Board (ERAB) was incorrect in concluding that the original application for an amended PRF was not unjust or wrong. The management level review (MLR) President agreed with his senior rater (SR) that the PRF was unjustly written.
2. The amended PRF contains a number of stratifications, the absence of which caused substantial prejudice.
3. The statements by his SR and MLR President make it clear that his PRF was both unjust and wrong and satisfies the standards for an SSB. Documents sent to a promotion board are required by Title 10 United States Code (USC) 615 to be a complete and fair record.
4. The SECAF violated DoDI 1320.08 and lacked the authority to change the six year protective window to a five year protective window. The SECAF's actions outside the law caused a chain reaction of procedural inequity that led to violations of AF regulations. The DoDI intended those within six-years of retirement to be continued on active duty and so did Congress.
5. Through no fault of his own, he has been subjected to an error-ridden chain of events that led to his involuntary

separation. His SR and MLR President admitted the errors in his PRF created an unjust situation.

His complete submission, with attachments, is at Exhibit A.

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STATEMENT OF FACTS:

On 30 Nov 11, the applicant was involuntarily discharged. He served 15 years, 3 months and 17 days of total active duty service.

The applicant has two nonselections to the grade of Lt Col by the CY10A (8 Mar 10) and CY11A (7 Mar 11) Lt Col LAF CSBs.

On 30 Nov 11, he was involuntarily discharged.

The applicant filed an appeal through the ERAB under the provisions of AFI 36-2401, *Correcting Officer and Enlisted Evaluation Reports*, however, the ERAB was not convinced the contested report was inaccurate or unjust and disapproved the applicant's request.

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 B through D.

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AIR FORCE EVALUATION:

AFPC/DPSID recommends denial of the applicant's request to substitute the contested PRF. DPSID states the applicant has not provided compelling evidence to show the report is unjust or inaccurate as written.

While one can sympathize with the applicant's experience, the fact remains that he did not exercise due diligence in ensuring that any perceived mistakes on his PRF were addressed with the SR and if necessary, corrected prior to the CSB. The applicant has simply not provided sufficient evidence in this case to substantiate that he was the recipient of any error or injustice in regards to his contested PRF. Based upon the presumed sufficiency of the prior ERAB decision, and no valid evidence provided by the applicant of any error or injustice, DPSID finds the contested report was properly prepared and made available to the applicant in a timely manner and the applicant was given the opportunity to perform due diligence on the PRF prior to the subject CSB, but failed to do so.

An evaluation report is considered to represent the rating chain's best judgment at the time it is rendered. 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.

The applicant has not substantiated that the contested report was not rendered accurately by the SR based upon knowledge available to him at the time.

The complete DPSID evaluation, with attachment, is at Exhibit B.

AFPC/DPSOO recommends denial of the applicant's request for SSB consideration. The applicant has not demonstrated that there was an actual material error in the preparation of his contested PRF. In addition, the actions taken by the SECAF not to continue officers within six years of retirement eligibility were done IAW DoDI 1320.08.

Under DoD policy, a commissioned officer on the Active Duty List (ADL) in the grade of major (O-4) shall normally be selected for continuation if the officer will qualify for retirement within six years of the date of continuation. When the Secretary of the Military Department concerned intends not to continue larger pools of officers in the grade of O-4 who would qualify for retirement within six years of the date of continuation, the Secretary shall notify the Under Secretary of Defense (USD) for Personnel and Readiness (P&R) of the proposed course of action.

For the applicant's continuation board, the SECAF, after notifying USD (P&R), used his authority to deviate from DoD policy to normally continue O-4s who are within six years of the date of continuation. Notification to USD (P&R) was made on 6 Dec 10.

The complete DPSOO evaluation is at Exhibit C.

AFPC/JA recommends denial of the applicant's stated requests. At the time the applicant's continuation board met, the governing DoDI was DoDI 1320.08, dated 17 Mar 07. Paragraph 6.3 provided, in part states:

A commissioned officer on the ADL in the grade of O-4 who is subject to discharge according to section 632 of Title 10 USC shall normally be selected for continuation if the officer will qualify for retirement according to section 8911 within six years of the date of continuation. The Secretary of the military department concerned may, in unusual circumstances such as when an officer's official personnel record contains derogatory information, discharge an officer involuntarily IAW section 632 of Title 10. When the Secretary of the Military Department concerned intends not to continue larger pools of officers in the grade of O-4 who would qualify for retirement within six years of the date of a continuation, the Secretary shall notify the USD (P&R) of the proposed courses of action.

The applicant's counsel is incorrect when he states DoD has defined "unusual circumstances" as derogatory information in the member's personnel record. In fact, the provision cites derogatory information as an example of an unusual circumstance, not as the sole unusual circumstance. The next to the last sentence of the paragraph clearly provides that "larger pools" of officers might be excluded from consideration (which would hardly limit the pool of potentially excluded officers solely to those with derogatory personnel information). All that is required under this authority is that the Secretary concerned notifies USD (P&R) of the proposed action. This was done for the applicant's board by memorandum from the SECAF to USD (P&R) dated 6 Dec 10, notifying the Under Secretary that he intended to exercise his authority under paragraph 6.3 to not selectively continue large pools of officers who would qualify for retirement within six years. Specifically, in order to manage the officer corps and to bring the Air Force within Congressionally mandated end-strength, the SECAF notified USD (P&R) of his intent not to continue large pools of twice-deferred officers in the grade of 0-3 and 0-4 who would otherwise qualify for retirement within six years of the date of a continuation. After notification, the SECAF modified the eligibility criteria and instructions to selective continuation boards accordingly.

Due to a recent update to DoDI 1320.08, dated 11 Apr 12, the language of paragraph 6.3 (now 6.3.1) provides that officers within four years of retirement will normally be continued, but there is no entitlement to continuation. Moreover, it now states that selection or non-selection will be based on the set criteria of the Secretary of the Military Department concerned. This provides a clearly expansive authority to the Secretary concerned to exempt officers according to criteria articulated by him.

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

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant's counsel states the advisory opinion argues that Congressional end strength mandates required large cuts to occur in the 0-4 grade. This is not true. At the end of Sep 11, the Air Force had 131 too few 0-4s (see attached Exhibit B). Therefore, it is unmistakable that the Air Force had room to keep 131 more 0-4s to stay in line with Congressional mandates. Counsel asserts the SECAF did not have the authority to change the six year window to the five year window and the advisory opinion did not provide any evidence to the contrary. The Secretary concerned never informed USD (P&R) of the six year to five year change in the one paragraph memo that the advisory opinion enclosed. The CSB looked at who fell within the five year period as the determining factor instead of reviewing an

airman's personnel record. If the five year window was the six year window as it was required to be, the applicant would still be on active duty because he would have been selectively continued.

Counsel asserts the advisory opinion utilizes a version of the instruction to conclude the applicant was legally discharged even though this version of the instruction does not legally apply to the facts of this matter. The fact the instruction explicitly states "there is no entitlement to continuation" cuts against their own argument because the Apr 12 version is not the version that applies to the applicant. In fact, the version that applies to the applicant does not include "there is no entitlement to continuation" language.

Moreover, the Apr 12, iteration of the instruction differs significantly in regards to the version that applies to the applicant. The Air Force chose to focus exclusively on "derogatory information" and nothing else. Thus, to the Air Force, "unusual circumstances" cannot mean anything other than LORs, referral OPRs, Article 15s and DUIs, none of which the applicant had.

Lastly, counsel asserts the advisory opinion does not present any reasonable evidence by which the applicant should not be given a SSB. The SR and MLR president both concur with their assessment that in order for fairness to play out a SSB is warranted. The applicant should be given a fair shake at promotion. Moreover, it would be unfair to every officer if they were treated in the same manner as the applicant. Fairness and justice demand the proper documents be laid out before the SSB.

In regards to the violation of DoDI 1320.08, counsel states the Air Force's argument relies exclusively on a one paragraph memo to USD (P&R) that does not even address the authority to change a six year to a five year window of protection. The advisory opinion did not even attempt to defend their perceived legal authority to make such an alteration to a Defense Department rule. Thus, the advisory opinion is unresponsive to their original filing and an admission that the SECAF does not (and did not in 2011) have the legal authority to change the six year window to a five year window. In addition, each and every point the Air Force made to defend the involuntary separation of the applicant is rebutted by the arguments set forth in their letter as well as the original filing.

In further support of his appeal, the applicant provides a six-page legal brief and various other documents associated with his request.

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

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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. Insufficient relevant evidence has been presented to demonstrate the existence of an error or injustice to warrant changing the record to show the applicant was selectively continued or reinstated to active duty. 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 office of primary responsibilities and adopt their rationale as the basis for our conclusion the applicant has not been the victim of an error or injustice. We note the applicant's counsel argues the SECAF violated the DoDI 1320.08 six-year protective retirement window policy for selective continuation without authority. However, other than his own ascertains, persuasive evidence has not been presented to show the SECAF acted without authority when he deviated from the DoD Policy nor has he demonstrated that the decision not to selectively continue him was unjust or contrary to the provisions of the DoDI. Therefore, we find no evidence the SECAF violated DoD 1308.08 or that the applicant should be selectively continued or reinstated to active duty. In view of the above and in the absence of evidence to the contrary, we find no basis to recommend granting this portion of his application.

4. Notwithstanding the above, sufficient relevant evidence has been presented to demonstrate the existence of error or injustice to warrant correcting his records to include the revised PRF and providing him SSB consideration. Although the OPR recommends denial because the applicant has not provided compelling evidence to show the PRF is unjust, it is our opinion the applicant has provided strong evidence from his senior rater and the MLR President to support this portion of his application. Both officials have indicated the contested PRF does not accurately portray their assessment of his promotion potential. Given this unequivocal support, we find the evidence in this case sufficient to recommend including the reaccomplished PRF in the applicant's OSR and granting him an SSB. Therefore, we recommend his records be corrected as indicated below.

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THE BOARD RECOMMENDS THAT:

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

a. The AF Form 709, *Promotion Recommendation Form (PRF)*, prepared for consideration by the Calendar Year 2010A (P0510A) Lieutenant Colonel Central Selection Board (CSB), reflecting the first line in Section IV, Promotion Recommendation, "Superb officer w/top tier career/accolades-space, acquisition, test, AFIT industry pgm, launch ops, Det/CC, HAF," be declared void and removed from his records.

b. The attached PRF, reflecting the first line in Section IV, *Promotion Recommendation*, "Extraordinary ldr! Phenomenal career, accolades-space/launch ops/acq, test, Ed w/Ind (only 2 acq-wide), Det/CC" be accepted for file in its place.

It is further recommended that his corrected record be considered for promotion to the grade of lieutenant colonel (O-5) by a Special Selection Board (SSB) for the Calendar Year 2010A (P0510A) Lieutenant Colonel CSB.

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The following members of the Board considered Docket Number BC-2012-02037 in Executive Session on 26 Feb 13, under the provisions of AFI 36-2603:

Panel Chair  
Member  
Member

The following documentary was considered:

- Exhibit A. DD Form 149, dated 3 May 12, w/atchs.
- Exhibit B. Letter, AFPC/DSID, dated 28 Jun 12, w/atch.
- Exhibit C. Letter, AFPC/DPSOO, dated 16 Aug 12.
- Exhibit D. Letter, AFPC/JA, dated 9 Oct 12, w/atch.
- Exhibit E. Letter, SAF/MRBR, dated 15 Oct 12.
- Exhibit F. Letter, Applicant, dated 12 Nov 12, w/atchs.

Acting Panel Chair