

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

FEB 09 1998

IN THE MATTER OF: -

DOCKET NUMBER: 94-02521 (Case 2)

COUNSEL: NONE

HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

1. The Promotion Recommendation Forms (PRFs) he received for the Calendar Years (CYs) 1992 and 1993 Central Major Selection Boards be declared void and removed from his records.
2. The promotion nonselections to the grade of major by the CY92 and CY93 Major Selection Boards be set aside.
3. He receive a direct promotion to the grade of major by the CY92C Major Selection Board, with back pay, allowances and entitlements.

APPLICANT CONTENDS THAT:

The Air Combat Command (ACC) and Air Force Materiel Command (AFMC) Management Level Evaluation Boards (MLEB) for the CY92 and CY93 Major Central Selection Boards awarded an illegal rating called "Top Promote." This illegal, secret, system was operated in violation of law. As such, he was not only denied knowledge of this 'secret' process when he was considered, but he was also denied the ability to compete within the process. The result of such an arbitrary and capricious system was a defective record which precluded him from competing in a 'fair and equitable process' as guaranteed by AFR 36-89.

The Promotion Recommendation (PRF) process is contrary to statute. The promotion recommendation process essentially eliminates any opportunity to appeal an inaccurate or unjust PRF.

In 1993, he was considered for promotion to major by a Special Selection Board (SSB) for the CY92C Major Board. This board was held contrary to statute since there were only four voting members from the Active Duty List (ADL).

The board(s) that considered his record used a computer model called the "Projected Order of Merit" (POM). This was a "secret system" not known by the board members, but only known by the board president and support staff. The use of illegal mini-boards substantially violated his rights for fair consideration.

The promotion selection boards are in violation of statute and Department of Defense (DoD) Directives.

The evidence proves significant legal errors occurred at the central selection boards which considered his file for promotion. The only opinion he has seen which discusses board procedures (AF/JAG opinion-Atch 2) is clearly directed at use of the "panel system"; however, even this opinion is based upon clearly flawed assumptions. Therefore, this document can serve as no basis for Air Force to justify their illegal actions as the evidence clearly proves each assumption is wrong! In addition to the defective record which led to his nonselection, the evidence also proves the central selection boards themselves were illegal and in direct violation of statute and directive.

A Special Selection Board (SSB) cannot resolve his promotion nonselection on a "fair and equitable basis." His flawed record of performance had a direct impact on the senior rater's assessment of his "performance based potential." This process cannot be "recreated" and even amendment of his PRF to communicate a "solid promote recommendation" would be flawed as records within various commands were identified as among the "top PRFs" in these commands. Therefore, he asks that the AFBCMR correct his record to reflect selection for major at the CY92C Major Board or at a minimum setting aside his nonselections for major to allow him to qualify for the Special Separation Bonus/Voluntary Separation Incentive (SSB/VSI).

In support of his request, applicant submits a 22-page statement, with attachments.

Applicant's complete submission is appended at Exhibit A.

STATEMENT OF FACTS:

On 16 May 1981, the applicant was appointed a second lieutenant, Reserve of the Air Force, and was voluntarily ordered to extended active duty on 23 August 1981. He was integrated into the Regular Air Force on 10 November 1987 and was progressively promoted to the grade of captain, effective and with a date of rank of 23 August 1985.

Applicant's OPR profile, commencing with the report closing 14 May 1992, follows:

<u>Period Ending</u>	<u>Evaluation</u>
# 14 May 92	Meets Standards
20 Dec 92	Meets Standards
## 31 Aug 93	Meets Standards

Top report at the time he was considered and nonselected for promotion to major by the CY92C Central Major Board (P0492C), which convened on 7 December 1992. The applicant received a "Promote" recommendation on his Promotion Recommendation Form (PRF) for the CY92C Central Major Board.

Top report at the time he was considered and nonselected for promotion to major by the CY93B Central Major Board (P0493B), which convened on 6 December 1993. The applicant received a "Promote" recommendation on his PRF for the CY93B Central Major Board.

Information maintained in the Personnel Data System (PDS) reveals that the applicant had an established date of separation (DOS) of 31 August 1994.

AIR STAFF EVALUATION:

The Evaluation Boards Branch, AFMPC/DPMAEB, reviewed this application and recommended denial. DPMAEB stated that the applicant alleges the Air Combat Command (ACC) and Air Force Materiel Command (AFMC) Management Level Evaluation Board (MLEB) for the CY92 and CY93 Major Central Selection Boards awarded an illegal rating called "Top Promote." There is no such rating system. However, in an effort to discriminate among officers who receive "Promote" recommendations, some senior raters employ a technique not addressed in AFR 36-10 in which they use comments such as "my top promote," and "if I had one more 'Definitely Promote' he'd get it," and other comments intended to convey to the central selection board how they rank-ordered their officers. Some senior raters will include comments that indicate how well an officer ranked at an MLEB carry-over competition if that officer was considered but did not receive a "DP" recommendation from the MLEB. The applicant contends that because officers who receive "DP" recommendations by senior raters or MLEBs are promoted near 100% of the time, then the process is illegal because the promotion selection board is not making the decision. Promotion recommendations are clear signals to the promotion selection board about the officers' duty performance, and how these officers compare to their peers within a clearly defined organization. The data shows that the officers with the best duty performance are receiving the top "DP" recommendations and the central selection boards are confirming the senior raters' assessments by promoting these officers based on their entire selection record. If the promotion recommendation system is working correctly, the officers who receive "DP" recommendations should be promoted at a rate near 100%. The applicant has not provided any evidence that he was treated unfairly by the officer evaluation system (Exhibit C).

The Selection Board Secretariat, AFMPC/DPMAB, stated that the applicant's claims his Special Selection Board (SSB) was contrary

to statute since there were only four voting members from the Active Duty List (ADL). This is incorrect. The statute does not address the issue of voting/nonvoting members. The statute does require a selection board to consist of five or more officers who are on the ADL. The composition of the SSB that considered the applicant was in compliance with the statute. DPMAB does not agree with the applicant's opinions and interpretations of statutes and fails to see where the applicant has proven his promotion boards were "defective." The applicant challenges long-standing board procedures and the certification of board results by the board members. Both the board procedures and the certification issue were reviewed as late as February 1992 by USAF/JAG and were found to be in compliance with applicable statutes. The applicant quotes from DODD 1320.12 that "Separate selection boards shall be convened for each competitive category and grade." However, he fails to quote from other portions of DODD 1320.12 that state: "Selection boards convened for different competitive categories or grades may be convened concurrently." and "When more than one selection board is convened to recommend officers in different competitive categories or grades for promotion, the written reports of the selection boards...may be consolidated into a single package for submission to the Secretary of the Defense." The applicant claims that the board(s) that considered his record used a computer model called the Project Order of Merit (POM). This is incorrect, no such computer model existed at that time. Applicant also faults the Selection Board scoring process and cites a SASC report stating "Such manipulated rescoring undermines the integrity of the promotion process because it provides discretion for the board's results to be altered to the advantage of a particular officer not initially selected and to the disadvantage of an officer initially selected." Applicant left out the next section of SASC report, which states: "The OSD did not find similar systematic problems with respect to selection for grades 0-6 and below." As to the Below-the-Promotion Zone (BPZ), all board members scoring the same competitive category are involved in the BPZ process. In summary, the applicant offers no supportable evidence that the promotion boards in question were in violation of statute, directive or policy. DPMAB recommended the application be denied (Exhibit D).

The Appeals and SSB Branch, AFMPC/DPMAJ, stated that the application was not processed under AFI 36-2401, Correcting Officer and Enlisted Evaluation Reports, because the applicant did not provide supporting statements from the senior rater who signed his PRFs or from the president of the MLEB who reviewed the PRFs. While the applicant speculates his record was at a disadvantage based on the events depicted, it should be noted that central boards evaluate the entire record to assess whole person factors such as job performance, professional qualities, depth and breadth of experience, leadership and academic and Professional Military Education (PME). DPMAJ concurred with the

advisory opinions from DPMAB and DPMAEB and recommended denial (Exhibit E).

Pursuant to the Board's request, the Staff Judge Advocate, HQ AFMPC/JA, addressed the allegations regarding illegal and secret MAJCOM promotion recommendation procedures; the violation of statute, DOD directive and Air Force regulation; and the illegal composition of central and special selection boards.

The Staff Judge Advocate, AFMPC/JA, reviewed this application and recommended denial. In JA's view, the applicant has failed to present relevant evidence of any error or injustice warranting relief. In JA's opinion, the governing regulation does not prohibit the promotion recommendation process used by the Air Combat Command (ACC). JA indicated that while that process is not specifically authorized per se, the regulation does require in narrative form an assessment of the ratee's performance based potential to support the overall promotion recommendation. In the opinion of both the OPR and JA, delineating among "promotes" to describe a particular officer's relative potential meets the standards of this provision and violates neither the letter nor spirit of any portion of the regulation. JA stated that there is no requirement that commands using such a system supplement the regulation. It is JA's opinion that the stratified promote system used by ACC does not constitute a "change to basic policy" - for which a supplement would be prohibited. JA noted that AF/CC's recent officer evaluation/promotion system review concluded that such MAJCOM stratified systems should be eliminated-but not because they were illegal; rather, it was determined that they created unnecessary perceived fairness problems.

As to the alleged improprieties with the CY93 PRF applicant received from Space and Missile Center (SMC) and Air Force Materiel Command (AFMC), JA indicated that while not ruling out the possibility that improper procedures might have been employed, the evidence in this file is insufficient to establish it.

JA stated that the governing regulation does not require the senior rater to compare the applicant's revised PRF with other records; rather, that individual is the person who must verify the inaccuracy of the original form and the accuracy of any proposed correction. The MLEB President, on the other hand, is required by regulation to "certify that compared to other records reviewed during the evaluation process, your record would have been competitive for the revised PRF assessment if the circumstances which caused the original PRF assessment had not existed." JA indicated that it is true that records of performance are not necessarily maintained so as to be available to an MLEB president who might be asked to make such a comparison. JA disagrees with the applicant, however, that this fact renders a meaningful comparison impossible. In JA's view,

the regulation provision does not prescribe a literal requirement to compare actual record of performance files. Rather, it is a requirement that the MLEB president compare an applicant's record against the general standard by which records of performance in that particular organization at that time would have qualified for an upwardly revised recommendation.

JA indicated that the applicant is confused and incorrect as to his conclusions that the AFR 31-11 requirement exceeds the standard of proof required by 10 U.S.C. 1552 and is illegal.

With regards to applicant's claims that the PRF process is contrary to statute because the Management Level Evaluation Board (MLEB) acts as a de facto promotion board, JA indicated that the very high rates of selection for promotion of officers with DP recommendations was fully expected and consistent with the aims of the officer evaluation program. JA stated that the officer evaluation system is just that - a system of evaluation and not one of ultimate selection for promotion. JA indicated that a "definitely promote" is not required for a promotion; there is always a significantly higher opportunity for promotion to every grade than the percentage of officers who can receive a DP recommendation. Substantial numbers of officers with "promote" recommendations have been selected for promotion. JA stated that applicant's argument that officers receiving DP recommendations constitutes a pre-selection of these officers, thereby effectively usurping the selection board statutory authority, ignores reality and is, in JA's view, totally unsubstantiated.

JA stated that differentiating among promotion candidates is traditional and has always been legal. The PRF process is merely the latest in a line of procedures used by the Air Force to assist promotion boards in identifying the best qualified officers for promotion. Contrary to the applicant's implications, JA indicated that an MLEB does not determine who will receive particular promotion recommendations. Rather, the MLEB determines only DP allocations. An officer's senior rater still must apply the allocations and ultimately decide which officers receive which recommendations or are submitted for "aggregation."

With regards to the applicant's assertions that promotion selection boards are contrary to Air Force regulation, DOD Directives and statutes (10 U.S.C. 616, 617), JA stated that there is no provision of law that specifically requires each member of a promotion board to personally review and score the record of each officer being considered by the board. JA indicated it is clear that at the time the Defense Officer Personnel Management Act (DOPMA) was enacted, Congress was aware of the existence of promotion board panels and expressed no problem with them. JA agrees that the Air Force methodology differs from the other services and might seem unorthodox, being different and unique does not make it illegal. JA indicated that

the bottom line is that it does meet the statutory mandates and the applicant has failed to prove otherwise.

In JA's opinion, applicant's argument that the Air Force promotion board was illegal because the Air Force convened a single board consisting of panels rather than convening separate boards as required by the DOD Directive is without merit. JA stated that it is clear the directive's purpose in requiring separate boards for each competitive category is to ensure that these officers compete only against others in the same competitive category - to assure fairness and compliance with Title 10, Chapter 36.

JA stated that the applicant has offered no proof that the presidents of any Air Force selection boards acted contrary to law or regulation.

As to the applicant's claim that his nonselection cannot be remedied by SSB consideration, it is JA's opinion that the Air Force's SSB procedure fully comports with the 10 U.S.C. 628(a)(2) requirement that an officer's "record be compared with a sampling of the records of those officers of the same competitive category who were recommended for promotion, and those officers who were not recommended for promotion, by the board that should have considered him." JA indicated that the burden is on the applicant to prove otherwise, and he has failed to do so.

JA indicated that the applicant's contention that too few active duty list (ADL) members were assigned to his SSB is incorrect. Five of the six members of the board were on ADL; the fact that one was the board president does not constitute a violation of 10 U.S.C. 612 or any other statute or regulation.

As to applicant's request for direct promotion, JA stated that both Congress and DOD have made clear their intent that errors ultimately affecting promotion should be resolved through the use of special selection boards. JA agrees with AF/JAG that the Board is not in the appropriate position to grant a direct promotion—that in promotion matters, the Board's statutory authority should be limited to correcting military records which may have affected the promotion process, and recommending SSB consideration in appropriate cases. JA indicated that the applicant competed at the CY92 and CY93 promotion boards with a "promote" recommendation and if his record were truly that deserving, he could have—and would have—been selected for promotion.

A complete copy of the JA evaluation is appended at Exhibit F.

APPLICANT'S REVIEW OF AIR STAFF EVALUATION:

The applicant reviewed the advisory opinions from AFMPC/DPMAEB, AFMPC/DPMAB, and AFMPC/DPMAJ, and submitted additional documents entitled "Evidentiary Support: Illegal Selection Boards and Irrelevant AF/JAG Opinion" (Appendix A), and "Evidentiary Support: Illegally Consolidated Selection Boards" (Appendix B). The applicant indicated that the evidence in the form of documents created by the Air Force themselves clearly proves the Air Force selection boards violate 10 USC, Sections 616, 617 provisions; the findings of the 22 Feb 92 AF/JAG opinion are not relevant to the grounds for relief presented in his petition/rebuttal. Therefore, he asks the Board to set aside the action by the illegal board.

The applicant reviewed the advisory opinion from AFMPC/JA and indicated that the evidence proves, beyond any doubt not only the general illegality of the top promote system, but more specifically, the unequivocal illegality of the top promote system within AFMC. As it is impossible to receive fair and equitable consideration via an SSB, both due to the illegal operations of various MAJCOM MLEBs as well as a PRF correction process tainted by illegally gained information, he requests that the Board correct his PRFs to reflect a "Definitely Promote" recommendation. He further concludes that Air Force selection boards violate the requirements of 10 USC, Section 616 and 617. The Air Force is required to follow the law, directives, and regulations, and failure to do so is fatal to the deviant action. Therefore, nonselections incurred at illegal selection boards are without effect and must be set aside. AFMPC/JA does not dispute any of his comments concerning board operations. AFMPC/JA avoids discussion of the requirements of statute. The evidence is clear that the results of the boards that considered his file for promotion did not meet the minimum requirements of law and violated DoD Directive. In fact, the certification process used by Air Force selection boards is nothing more than an attendance roster! While AFMPC/JA claimed "none of the duties prescribed for board presidents" violated DoDD 1320.12, they declined discussion of the issues and provided no evidence to support their view. Therefore, he concludes that the evidence proves direct promotion is within the AFBCMR's authority and that SSBs cannot provide a full let alone fitting measure of relief. Therefore, he requests the Board direct his record be corrected to reflect selection for promotion to major as if selected by the CY92 Major Board.

Applicant's response to the evaluations is appended 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 filed.

3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. We find insufficient evidence to support applicant's request to void the Promotion Recommendation Forms (PRFs) for the Calendar Years (CYs) 1992 and 1993 Major Boards or to upgrade the PRFs to a "Definitely Promote." Applicant has failed to provide sufficient evidence showing that the recommendations he received were in error or unjust. Noticeably absent are statements of support from the senior raters of the PRFs in question and the presidents of the MLEBs or evidence showing that those individuals did not have access to adequate information on which to base their decisions concerning the award of a proper promotion recommendations when comparing the applicant's record of performance with those of his peers. In the absence of such evidence, we find no basis upon which to conclude that the promotion recommendations he received were inaccurate. As to applicant's contentions concerning the statutory compliance of central selection boards, the legality of the promotion recommendation process, and the legality of the SSB process, in our opinion, have no merit. The detailed comments provided by the appropriate offices adequately address these issues. In view of the above findings, we are in complete agreement with the comments and recommendations made by the appropriate Air Force offices and adopt the rationale expressed as the basis for our decision that the applicant has failed to sustain his burden of establishing that he has suffered either an error or an injustice.

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 issue(s) 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 probable 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 this application in Executive Session on 15 December 1997, under the provisions of AFI 36-2603:

Mr. Charles E. Bennett, Panel Chairman
Mr. Gregory H. Petkoff, Member
Mr. John L. Robuck, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 31 May 94, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFMPC/DPMAEB, dated 27 Jun 94.
- Exhibit D. Letter, AFMPC/DPMAAB, dated 1 Jul 94.
- Exhibit E. Letter, AFMPC/DPMAJ, dated 17 Aug 94.
- Exhibit F. Letter, AFMPC/JA, dated 16 May 95.
- Exhibit G. Letters, SAF/MIBR, dated 22 Aug 94 and 31 May 95.
- Exhibit H. Letter from applicant, dated 23 Sep 94, with Appendix A and B, and letter from applicant, dated 30 Jun 95, w/atchs.


CHARLES E. BENNETT
Panel Chairman