

RECORD OF PROCEEDINGS  
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 94-10292

COUNSEL: Controlled Equity, INC.

HEARING DESIRED: YES

MAY 23 1995

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APPLICANT REQUESTS THAT:

1. Set aside all nonselections to the grade of major.
2. His record be corrected to reflect continuous active service as a a captain from the date he was separated as a result of his nonselection to the grade of major.
3. His record be corrected to reflect retirement in the grade of captain the first day of the month after the decision of his application is announced.
4. He receive any and all back pay, allowances, and entitlements, to include retirement pay and allowances, associated with continuous active service until retirement in the grade of captain.

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APPLICANT CONTENDS THAT:

The inequities and regulatory violations of the controlled Officer Effectiveness Report (OER) system in effect from 1975 until 1978 precluded him from receiving the "fair and equitable" consideration guaranteed by statute, directive, and implementing directive. Secondly, the selection boards themselves were held in direct violation of statute, directive, and implementing regulation. As a result, he was not selected for promotion and was involuntarily separated from extended active duty.

In support of the appeal, counsel submits an 9 page brief, with 6 attachments.

Applicant's complete submission is attached at Exhibit A.

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STATEMENT OF FACTS:

Applicant was commissioned a second lieutenant on 10 February 1965 and entered extended active duty. He was promoted to the grade of permanent captain effective 2 October 1972.

applicant was considered and not selected for promotion to the grade of major by the Fiscal Year 1976 (FY76) and FY79 Temporary Major Boards and the Calendar Year 1979 (CY79) and CY80 Regular Major Boards.

OER/OPR profile since 1974 follows:

<u>PERIOD ENDING</u>	<u>EVALUATION OF POTENTIAL</u>
28 SEP 74	8-3
31 OCT 75	2-2-2
31 MAR 76	Abbreviated Report
31 OCT 76	3-3-3
31 OCT 77	2-2-2
31 OCT 78	1-1-1

On 29 February 1980, applicant was involuntarily discharged from active duty in the grade of captain under the provisions of AFR 36-12 for failure to be promoted. He served 15 years and 21 days of active duty and received \$15,000.00 in severance pay.

On 8 July 1989, applicant enlisted in the Air National Guard (ANG) and is currently serving as a technical sergeant in the MOANG.

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AIR STAFF EVALUATION:

The Chief, Officer Evaluation Branch, AFMPC/DPMAEP, reviewed the application and states that they find the information provided does not substantiate unfair treatment by the controlled OER system for applicant. Counsel provides no factual support with respect to applicant's history and case circumstances. They state that it is reasonable to expect that more senior, experienced, and mature officers in competition with less experienced contemporaries would receive a higher percentage of top block ratings. A review of the documents provided does not reveal any violation of regulatory provisions or indicate that any OER(s) is/are flawed. Therefore, they recommend denial of applicant's request.

A complete copy of the evaluation is attached at Exhibit C.

The Chief, Selection Board Secretariat, AFMPC/DPMAB, reviewed the application and recommends denial. They state that counsel has not substantiated his allegations that the promotion boards in question were illegal or unfair. Although counsel challenges the panel concept used by the Air Force and the certification requirements of the board results, the Air Force has used the panel concept for many years in conducting selection boards and the procedure was reviewed as late as February 1992. The panel concept has safeguards to insure an equal distribution of the

quality spectrum of records to each panel. As each panel scores its records, an order of merit (OOM) is formed. It is the board president's responsibility to review the OOMs to insure consistency of scoring on each panel and consistency of quality among the panels. Without exception, the quality of records always has been identical at the same percentage level on each OOM. While it is true that the board members do not see a complete select list, under the panel concept one panel does not need to know what the other panels have done. The panel's task is to align their records in an OOM and break ties when the quota runs out at a score category that has more records in it than the quota allows to be promoted, commonly known as the "gray zone." In resolving gray zone ties, the panel understands that all records scoring higher than the lowest select on its OOM are also selects. Counsel addresses the "use of a secret computer model, the Projected Order of Merit (POM)." Counsel claims that this is a "secret system" known only to the Board president. While counsel would have us believe some secret computer product was the reason for applicant's nonselection, that is not the case. It is true that in the past computerized products were sometimes used as a management tool to assist the board president to perform his responsibility of ensuring consistency in scoring among panels; however, decisions to recommend individuals for promotion have always been a subjective judgment by the promotion board members; such decisions have never been subordinated to a "secret computer model," as alleged by counsel. Counsel's allegation regarding the illegality of special selection boards (SSBs) is without merit.

A complete copy of the evaluation is attached at Exhibit D.

The Chief, Appeals and SSB Branch, AFMPC/DPMAJA, reviewed the application and states that the advisory opinions from DPMAEP and DPMAB address applicant's allegations and supporting documentation. They recommend denial on the basis of timeliness; if considered, deny due to lack of merit.

A complete copy of the evaluation is attached at Exhibit E.

The Chief, Officer Separations Section, AFMPC/DPMARS1, reviewed the application and states that applicant's discharge was executed in accordance with law and regulations in effect at the time. There is no justification to correct the records to reflect continuous active service. Therefore, they recommend denial of applicant's request.

A complete copy of the evaluation is attached at Exhibit F.

The Staff Judge Advocate, AFMPC/JA, reviewed the application and recommends denial on the basis of timeliness. They state that applicant has failed to file within the allotted time period and has not satisfactorily explained this failure. It would not be in the interest of justice to excuse the failure. It is also

their opinion that applicant has failed to sustain his burden of establishing any error or injustice.

A complete copy of the evaluation is attached at Exhibit G.

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**APPLICANT'S REVIEW OF AIR STAFF EVALUATION:**

Counsel reviewed the Air Staff evaluations and in summary states that the evidence is clear. Applicant was the victim of a systemically inequitable evaluation system. This systemic inequity rose to legal error when applicant was not considered on a fair equitable basis for promotion although the statute and service directive required such consideration. Applicant further requests this petition be adjudicated on its merits and not time barred from consideration due to evidence of a clear injustice and evidence of fraudulent concealment of known inequities associated with failure of the controlled OER system and the impact of this failure on promotion consideration. Not only was this information concealed from applicant in hearing his claim presented to the Court of Claims, but such information could not be obtained through Freedom of Information request or request through his congressman.

In support of applicant's request, counsel submits a seven page rebuttal with four attachments.

Counsel's complete response is attached at Exhibit I.

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**FINDINGS AND CONCLUSIONS OF THE BOARD**

1. The application was not filed within three years after the alleged error or injustice was discovered, or reasonably could have been discovered, as required by Section 1552, Title 10, United States Code (10 USC 1552), and Air Force Regulation 31-3. Although the applicant asserts a date of discovery which would, if correct, make the application timely, the essential facts which gave rise to the application were known to applicant long before the asserted date of discovery. Knowledge of those facts constituted the date of discovery and the beginning of the three-year period for filing. Thus the application is untimely.

2. Paragraph b of 10 USC 1552 permits us, in our discretion, to excuse untimely filing in the interest of justice. We have carefully reviewed applicant's submission and the entire record, and we do not find a sufficient basis to excuse the untimely filing of this application. The applicant has not shown a plausible reason for delay in filing, and we are not persuaded that the record raises issues of error or injustice which require resolution on the merits at this time. Accordingly, we conclude

that it would not be in the interest of justice to excuse the untimely filing of the application.

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 issue(s) involved. Therefore, the request for a hearing is not favorably considered.

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**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.

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The following members of the Board considered this application in Executive Session on 19 January 1995 under provisions of AFR 31-3:

Mr. Walter A. Willson, Panel Chairman  
Ms. Karen Bingo, Member  
Ms. Martha Maust, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 24 Apr 93, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFMPC/DPMAEP, dated 22 Sep 93.
- Exhibit D. Letter, AFMPC/DPMAB, dated 29 Nov 93, w/atchs.
- Exhibit E. Letter, AFMPC/DPMAJ, dated 24 Jan 94.
- Exhibit F. Letter, AFMPC/DPMARS1, dated 10 Feb 94.
- Exhibit G. Letter, AFMPC/JA, dated 19 May 94.
- Exhibit H. Letter, AFBCMR, dated 2 Jun 94 and 7 Jul 94.
- Exhibit I. Counsel's response, undated, with attachments.

*Walter A. Willson*  
WALTER A. WILLSON  
Panel Chairman