

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 94-10339

COUNSEL: NONE

HEARING DESIRED: YES

MAY 23 1995

APPLICANT REQUESTS THAT:

1. Set aside all nonselections to the grade of major by the Calendar Years 1979 (CY79) and CY80 Central Boards and Special Selection Boards (SSBs).
2. Promotion to the grade of major as though selected by the CY79 selection board.
3. Continuation on active duty for a period of time in order to be considered for promotion to the grade of lieutenant colonel by two selection boards.
4. He receive any and all back pay, allowances, and entitlements, to include what he would have accrued on extended active duty.
5. The Officer Effectiveness Reports (OERs) rendered for the periods closing 16 March 1975 and 31 July 1978 be declared void.
6. His record be corrected to reflect continuous active service from the date he was separated as a result of his illegal separation until the date of decision of his application and direct retirement in the grade of major at this point.

APPLICANT CONTENDS THAT:

As a result of a previous appeal, he was afforded consideration for promotion to the grade of major by SSB; however, it appears that those boards were improperly convened and conducted. Also, 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 a 16 page brief, with attachments.

Applicant's complete submission is attached at Exhibit A.

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 10 February 1972.

Applicant was considered and not selected for promotion to the grade of major by the CY76, CY78, and CY79 Temporary Major Selection Boards. He was also considered and not selected by the CY79 and CY80 Permanent Major Selection Boards. As a result of an earlier appeal to the AFBCMR, he was considered and not selected by Special Selection Board (SSB), which convened on 8 November 1982, by each of the above boards.

OER/OPR profile since 1970 follows:

<u>PERIOD ENDING</u>	<u>EVALUATION OF POTENTIAL</u>
10 MAY 70	8-4
31 OCT 70	9-4
31 OCT 71	8-3
30 SEP 72	9-3
15 JUL 73	9-4
15 JUL 74	9-4
16 MAR 75	8-3
17 MAR 75 THRU 31 OCT 76	Not rated for period; report removed by order of CS
31 OCT 77	2-2-2
31 JUL 78	1-2-2
31 JUL 79	3-3-3

On 29 February 1980, applicant was involuntarily discharged in accordance with AFR 36-12, paragraph 3-5, for failure to be promoted. He served over 15 years of active duty and received severance pay in the amount of **\$15,000.00**.

AIR STAFF EVALUATION:

The Deputy Chief, Selection Board Secretariat, AFMPC/DPMAD; the Chief, Evaluation Procedures Branch, AFMPC/DPMAEP; the Chief, Appeals and SSB Branch, AFMPC/DPMAJA; the Chief, Officer Separations Section, AFMPC/DPMARS1; the Chief, Retirement Programs Section, AFMPC/DPMARR1; and the Staff Judge Advocate, AFMPC/JA reviewed the application and recommended denial.

Copies of the evaluations are attached at Exhibits C, D, E, F, G, and H.

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APPLICANT'S REVIEW OF AIR STAFF EVALUATION:

Applicant reviewed the Air Staff evaluations and provides an 18 page response, with attachments, which is attached at Exhibit J.

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.

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 this application in Executive Session on 19 January 1995, under the 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 15 May , w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFMPC/DPMAB, dated 16 Sep 93.
- Exhibit D. Letter, AFMPC/DPMAEP, dated 4 Oct 93.
- Exhibit E. Letter, AFMPC/DPMAJA, dated 16 Dec 93.
- Exhibit F. Letter, AFMPC/DPMARS1, dated 11 Feb 94.
- Exhibit G. Letter, AFMPC/DPMARR1, dated 30 Mar 94.
- Exhibit H. Letter, AFMPC/JA, dated 12 May 94.
- Exhibit I. Letter, AFBCMR, dated 24 Aug 94.
- Exhibit J. Applicant's response, dated 13 Dec 94, w/atchs.

Walter A. Willson
WALTER A. WILLSON
Panel Chairman