

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 96-00592

COUNSEL: [REDACTED]

FEB 25 1999

HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

His pay grade of 0-8 be reinstated retroactive to 1 Mar 93 with back pay and/or other appropriate relief.

APPLICANT CONTENDS THAT:

He was denied the opportunity to obtain witness statements and evidence to present in response to the action taken against him under 10 USC 1370.

In support of his appeal, the applicant provided a counsel's brief and numerous other documents associated with the matter under review.

Applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS:

On 28 Feb 93, the applicant was relieved from active duty and retired, effective 1 Mar 93, in the grade of colonel with highest grade held was major general. He was credited with 32 years, 11 months, and 12 days of active duty service.

Applicant's OER/OPR profile since 1981 follows:

<u>PERIOD ENDING</u>	<u>EVALUATION</u>
10 May 81	1-1-1
10 May 82	1-1-1
7 Dec 82	1-1-1
3 Nov 83	1-1-1
31 Jul 84	1-1-1
16 Apr 85	1-1-1
16 Apr 86	1-1-1

(Examiner's Note: General Officer evaluation reports with a close-out date on or before 31 Jan 91 were destroyed by order of the Secretary of the Air Force).

30 Jun 91	10 (1-10 (highest))
30 Jun 92	8 (1-10 (highest))

Available documentation reflects that, on 22 Sep 92, the commander notified the applicant that he was considering whether he should be punished under Article 15, Uniform Code of Military Justice (UCMJ) based on allegations that the applicant did, on divers occasions between on or about 24 Jul 91 and on or about 7 Aug 91, wrongfully solicit Major S--- D. W--- to dispose of certain captured or abandoned property, to wit: two AK-47 weapons, one rocket propelled grenade, and one hand grenade, each of some value, and of a total value in excess of \$100, for the purpose of receiving a benefit for himself; and on or about 23 Jul 91, violated a lawful general order, to wit: General Order 1, dated 30 Aug 90, issued by Headquarters United States Central Command, by wrongfully taking war trophies, to wit: two AK-47 weapons. After consulting military legal counsel, the applicant waived his right to demand trial by court-martial and accepted the nonjudicial punishment proceedings under Article 15. He indicated that he desired to make an oral presentation to the commander and submitted written comments for review. On 29 Sep 92, after considering the matters presented by the applicant, the commander found that the applicant had committed one or more of the offenses alleged and imposed punishment. The applicant received a reprimand. Applicant did not appeal the punishment. A review by legal authority found the nonjudicial punishment under Article 15 to be legally sufficient.

On 7 Dec 92, the Deputy Chief of Staff for Personnel notified the applicant that a determination would be made pursuant to 10 USC 1370 of the grade in which the applicant would be retired. On 7 Jan 93, the Air Force Personnel Board considered his case. The Board found the following operative facts with respect to the allegations of which the applicant was given notice:

Allegations 1 and 2: Weapons Violations - While serving as the Chief of the USMTM in Saudi Arabia during the summer of 1991, the applicant wrongfully retained two AK-47 rifles and improperly solicited his executive officer to dispose of the rifles in a way which would inure to the applicant's personal benefit. Notwithstanding the applicant's protestations of innocence, the Board concluded that a preponderance of evidence demonstrated that the applicant did, in fact, wrongfully retain the AK-47 rifles and did improperly solicit his executive officer to dispose of the weapons in a way which would inure to the applicant's benefit.

Allegation 3: Official Travel to Denver, Colorado - Between the summers of 1989 and 1991, the applicant demonstrated poor

judgment by making four trips from his official duty location to Denver, Colorado under circumstances which created the appearance that he was abusing the authority of his grade and position by traveling at public expense to satisfy his own private interests. The Board concluded that the applicant's repeated official duty travel to Denver constituted an abuse of his discretion to determine what governmental travel was appropriate, and demonstrated qualities of judgment below that expected of an officer of his rank and position.

Allegation 4: Receipt of Gifts - While assigned in Saudi Arabia, the applicant failed to report receipt of a set of watches as gifts, in violation of Air Force Regulation 11-27. While the Board concluded that the allegation in question was supported by a preponderance of evidence, it nonetheless noted that its gravity, standing alone, paled in relation to some other allegations. However, in the Board's view, the applicant's insensitivity to the regulatory protocol of recording and reporting receipt of gifts was part of a larger pattern, and the Board elected to view it primarily in that light.

Allegation 5: Shipment of Government Property with Household Goods - Applicant was not culpable in allowing items of government property to be shipped from Saudi Arabia with his household goods. While the Board felt the applicant's conduct helped create the appearance that he had improperly allowed government property to be shipped with his household goods, it nevertheless concluded the specific allegation of which the applicant was given notice was not substantiated, and therefore determined not to consider it in assessing the applicant's service.

Allegation 6: Misuse of Saudi Peace Shield Case Funds - Between Jan 88 and Jul 89, while serving as the Director, AF/PRI, the applicant demonstrated poor judgment and created the appearance of using his office for his personal benefit by misusing Saudi Peace Shield case funds for TDY travel. Applicant insisted he never concerned himself with such mundane matters as which fund cite should be used for his travel, and he was never confronted regarding the Peace Shield fund cite. Moreover, if the wrong fund cite was used, the applicant maintained it was the fault of people working for him, not his. In the Board's view, the applicant's contentions regarding use of the Peace Shield fund cite were not credible, and the allegation was substantiated by a preponderance of evidence.

In forming its judgment as to the quality of the applicant's service, the Board paused to note the considerable deference it gave to the views of those distinguished individuals who viewed the applicant's service **as** a general officer favorably. Nonetheless, it was the Board's heavy burden to weigh all the evidence and exercise its independent judgment in a case of obvious importance to both the applicant and the United States. Had those individuals who shared a favorable perspective of the

applicant's service been privy to the exhaustive evidence considered by the Board, they too might have joined the Board's judgment.

On 14 Jan 93, the Secretary of the Air Force indicated that he had carefully considered the findings and advisory assessment of the Air Force Personnel Board, the supporting documentation, the recommendation of the CINCUSAFE, and the materials submitted by the applicant and counsel. He concluded that the applicant did not meet the standards of service expected of a general officer in the United States Air Force. He found that the applicant did not serve satisfactorily in the grades of major general or brigadier general, within the meaning of Section 1370 of Title 10, United States Code. Therefore, the Secretary of the Air Force accepted the applicant's application for retirement and directed that he be retired in the grade of colonel as soon as possible.

AIR FORCE EVALUATION:

The General Law Division, HQ USAF/JAG, reviewed this application and recommended denial. JAG noted the applicant's allegations. According to JAG, the Secretary's grade determination in this case was legal and proper. The decision was not arbitrary and capricious, it was supported by substantial evidence, and it was in accordance with the applicable statute. The procedures utilized by the Secretary to reach his decision were reasonable and his decision was in accordance with the recommendation of a Board comprised of three lieutenant generals. Furthermore, the applicant's continuing misconduct, which evidenced a clear disregard for officership, leadership and the law, warranted retirement in the grade of colonel. In JAG's view, no injustice or legal error was found in the record.

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

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

In his response, counsel indicated that nothing in the advisory opinion disputed the fact that the applicant and his attorneys were denied the time and resources needed to adequately respond to the Peace Shield fund allegations which had been under investigation by the OSI for months. Regarding the temporary duty (TDY) allegations, no time was provided for the applicant to obtain statements from eleven witnesses in Denver who had been interviewed by his defense attorneys and who supported his claim that substantive issues were addressed during the Denver TDYs.

In counsel's view, the advisory opinion focused on facts favorable to the Air Force position, but ignored facts which were

contradictory. The record speaks for itself. He challenges the Air Force to produce evidence that any other major general in Air Force history has been treated the way the applicant was treated. All perspective was lost in the applicant's case. To the extent the Air Force has substantiated any misconduct, which he challenges, his efforts serving this nation in time of peace and war far outweigh any shortcomings. There was no reasonable justification for singling the applicant out from all other generals in Air Force history to be reduced to the grade of colonel in retirement. For all these reasons, his loss of grade at the time of his retirement must be deemed arbitrary, capricious, and unreasonable.

Counsel's complete response is at Exhibit E.

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. The applicant's complete submission was thoroughly reviewed and his contentions were duly noted. However, a majority of the Board does not find the applicant's assertions sufficiently persuasive to override the rationale provided by the Air Force office of primary responsibility (OPR). Therefore, in the absence of evidence which shows to the satisfaction of the Board majority that the information used as a basis for the Secretary's determination of the grade in which the applicant would be retired was erroneous, or that the Secretary abused his discretionary authority, the Board majority agrees with the recommendation of the OPR and adopts their rationale as the basis for its decision that the applicant has failed to sustain his burden of establishing that he has suffered either an error or an injustice. Accordingly, a majority of the Board finds no compelling basis to recommend granting the relief sought in this application.

RECOMMENDATION OF THE BOARD:

A majority of the panel finds insufficient evidence of error or injustice and recommends the application be denied.

The following members of the Board considered this application in Executive Session on 1 Sep 98, under the provisions of AFI 36-2603:

Mr. Benedict A. Kausal IV, Panel Chair
Mr. Terry A. Yonkers, Member
Mr. Patrick R. Wheeler, Member

By a majority vote, the Board voted to deny the request. Mr. Wheeler voted to grant the request but did not desire to submit a minority report. The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 22 Feb 96, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, HQ USAF/JAG, dated 5 Apr 96.
Exhibit D. Letter, SAF/MIBR, dated 29 Apr 96.
Exhibit E. Letter, counsel, dated 30 Jun 96.


BENEDICT A. KAUSAL
Panel Chair