RECORD OF PROCEEDINGS

AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: BC-2010-02704

XXXXXXX COUNSEL: NONE

HEARING DESIRED: YES

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APPLICANT REQUESTS THAT:

1.  His date of rank for the grade of lieutenant colonel (O-5) be backdated to 2 Aug 07, instead of 18 Sep 08.

2.  He be appointed in the Air Force Reserve Active Guard/ Reserve (AGR) program, effective 1 Feb 08, with all relevant pay, points, and allowances, to include Aviator Continuation Pay of $25,000 per year for a term of four years.

3.  The Board direct further investigation into the lack of systemic control within the US Air Force Academy (USAFA) faculty.

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APPLICANT CONTENDS THAT:

He was unfairly denied the opportunity to meet the FY08 United States Air Force Reserve (USAFR) Line Lieutenant Colonel Promotion Board as a “Position Vacancy” candidate. He was unfairly denied the opportunity to apply for multiple AGR positions, including one in his organization for which he was more qualified than the officer selected. He had his reputation damaged by repeated, unwarranted career interference by members of his supervisory chain when they provided negative references to potential employers. An Inspector General (IG) investigation substantiated that he repeatedly suffered abuse of authority, restriction, and reprisal at the hands of his chain of command. However, based on incomplete information, the Superintendent, USAFA (USAFA/CC) later amended some of those findings to indicate they were unsubstantiated. By amendment, he contends that his officer performance report (OPR), closing 14 Feb 08, was a possible reprisal action, given the timing of his IG complaint.

In support of his appeal, the applicant provides an expanded statement and copies of three supporting statements, an IG Report of Investigation, email traffic, memoranda for record, and AGR vacancy announcements related to the matter under review.

The applicant’s complete submission, with attachments, is at Exhibit A.

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STATEMENT OF FACTS:

Information extracted from the Military Personnel Data System (MilPDS) indicates the applicant is currently serving in the Air Force Reserve as an Individual Mobilization Augmentee (IMA) in the grade of lieutenant colonel (O-5), effective and with a date of rank of 18 Sep 08.

On 5 Jul 06, he commenced a temporary tour of active duty as an instructor at the USAFA, performing successive active duty tours until his reassignment to an IMA position at Nellis AFB, NV on 22 Aug 08.

On 6 Mar 08, the applicant filed an AF Form 102, *Inspector General Personal and Fraud, Waste, and Abuse Complaint Registration*, alleging reprisal within his department. On 2 May 08, USAFA/CC directed an investigation into the applicant’s allegations. The investigation was conducted from 14 May 08 through 11 Jun 08 at the USAFA and via telephone communications with witnesses. The specific allegations and findings are as follows:

**Allegation 1**.  That on or about 28 Oct 06, Lt Col X--- abused his authority by implying to the applicant that his approval was required in order for the applicant to audit a course outside of his academic department.

**FINDING:** NOT SUBSTANTIATED

**Allegation 2.**  That on or about 4 Sep 07, Lt Col X--- abused his authority by implying to the applicant that he would be terminating his employment in his department.

**FINDING** (As amended by USAFA/CC): NOT SUBSTANTIATED

**Allegation 3**.  That on or about 11 Sep 07, Lt Col X--- abused his authority by implying to the applicant that he would prevent his future employment within the faculty of the USAFA.

**FINDING**: (As amended by USAFA/CC): NOT SUBSTANTIATED

**Allegation 4**.  That on or about 4 Oct 07, Col X--- restricted the applicant’s access to the chain of command by verbally counseling him for making a protected communication.

**FINDING:** NOT SUBSTANTIATED

**Allegation 5.**  That on or about 28 Nov 07, Col X--- restricted the applicant’s access to the chain of command by verbally counseling him for making a protected communication.

**FINDING:** SUBSTANTIATED

**Allegation 6**.  That on or about 29 Feb 08, Col X--- restricted the applicant’s access to his chain of command by issuing him a letter of counseling (LOC) for making multiple protected communications.

**FINDING**: SUBSTANTIATED

**Allegation 7.**  That on or about 2 Oct 07, Lt Col X--- reprised against the applicant for making a protected communication by preventing his participation as a tutor on a trip with the USAFA women’s tennis team.

**FINDING:** NOT SUBSTANTIATED

**Allegation** **8.**  That on or about 3 Oct 07, Lt Col X--- reprised against the applicant for making a protected communication by rescinding reserve mandays previously allotted to him.

**FINDING** (As amended by USAFA/CC): SUBSTANTIATED

**Allegation 9.**  That on or about 22 Nov 07, Col X--- reprised against the applicant for making a protected communication by providing negative information about him to a potential employer.

**FINDING** (As amended by USAFA/CC): NOT SUBSTANTIATED

**Allegation 10.**  That on or about 6 Dec 07, Colonel X--- reprised against the applicant for making a protected communication by providing negative information about him to a potential employer.

**FINDING:** NOT SUBSTANTIATED

**Allegation 11.**  That on or about 29 Feb 08, Colonel X--- reprised against the applicant for making a protected communication by issuing him an LOC.

**FINDING:** SUBSTANTIATED

On 5 Apr 10, HQ USAFA/IG notified the applicant the Department of Defense Inspector General’s Office (DOD/IG) found the subjects of the investigation did reprise against him and restrict him from making a protected communication.

The remaining relevant facts pertaining to this application are contained in the applicant’s master personnel records and the letter prepared by the appropriate office of the Air Force, which are attached at Exhibits B and C.

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AIR FORCE EVALUATION:

AFRC/A1A recommends denial, indicating there is no basis to assume the applicant would have been selected for position vacancy promotion by the lieutenant colonel promotion board, or hired as an AGR. In accordance with AFI 36-2132, *Full-Time Support (FTS) AGR Program*, a written release from a member’s commander is required for a member to be eligible to apply for an AGR vacancy. The applicant did not obtain such a release from his commander and their records show that his application was not among the ten received for the position. As for his request for ACP, the applicant was not selected for an AGR position, and, thus, is not eligible for an ACP bonus or any back pay or allowances.

A complete copy of the AFRC/A1A evaluation is at Exhibit C.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant objects to the basis of the AFRC conclusion that since he did not apply for the position, he is not entitled to redress. Since the basis for his claim is that he was improperly denied the opportunity to apply for the position, the rationale of the evaluation, that his application was not received, is irrelevant. Nonetheless, he believes he would have been selected for the position because he was more qualified, in terms of education and operational experience, than the officer who was ultimately selected. While he specifically cites this particular position in his application, it was not the only position he was inappropriately denied the right to apply for. He also points out that his Feb 08 OPR is possibly a form of reprisal for filing an IG complaint because it contains a weak push line and is written using terminology in an attempt to weaken the stratification. Finally, he describes case law and certain previous AFBCMR cases that he believes support his request.

The applicant’s complete response, including attachments, is at Exhibit E.

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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.  Sufficient relevant evidence has been presented to demonstrate the existence of an error or injustice regarding the applicant’s ability to meet the FY08 USAFR Line Lieutenant Colonel Promotion Board as a position vacancy candidate. The applicant contends that his chain of command unfairly withheld his name from consideration when his previous unit failed to timely file some of his officer performance reports (OPRs). After a thorough review of the evidence of record, including the IG report, we agree. In this respect, we note that circumstances which were beyond his control resulted in his name not being forwarded for consideration. While we believe the evidence supports granting the applicant some relief due to this error, we do not find it is sufficient for us to recommend direct promotion. In this respect, we believe that a duly constituted selection board, applying the complete promotion criteria, is in the best position to render this vital determination, and that its prerogative to do so should only be usurped when there are: 1) extraordinary circumstances (e.g., a showing that the officer’s record cannot be reconstructed in such a manner so as to permit fair and equitable consideration) and 2) when the probability of selection for promotion would have been extremely high were it not for the original errors. We find no such showing here. Therefore, we believe affording him supplemental consideration by a Special Board represents full and fitting relief in this case. We note that his record, as it existed the day the board convened, lacked a Promotion Recommendation Form (PRF) as he was never recommended for consideration by the contested board. However, in view of the fact he was considered for promotion by a subsequent mandatory promotion board, and the record considered by that board contains a PRF describing his accomplishments over roughly the same period, we believe it is appropriate to utilize the PRF, appropriately modified, for use by the Special Board in evaluating his promotion potential. Accordingly, we recommend his complete record, as of the date of the original board, to include the aforementioned OPRs and the appropriately modified PRF, be considered by a Special Board under the provisions of 10 USC 1558 for promotion to lieutenant colonel. As regards to his remaining assertions that members of his chain of command unfairly denied him consideration for multiple positions within the AGR program and damaged his reputation by providing negative references to potential employers, we will discuss these assertions in conjunction with our reprisal analysis below.

4. The applicant alleges that he has been the victim of reprisal and has not been afforded full protection under the Whistleblower Protection Act (10 USC 1034). We note the applicant filed an IG complaint alleging, among other things, that members of his chain of command unfairly denied him the opportunity to apply for multiple AGR positions and damaged his reputation by providing negative references to potential employers in retaliation for his multiple protected communications with his chain of command. The IG investigated his allegations of abuse of authority, restriction, and reprisal and made four distinct findings, as amended by USAFA/CC, of restriction and reprisal. Based upon our own independent review, we have determined the applicant has established he was subjected to restriction and reprisal in violation of 10 USC 1034. The applicant was twice subjected to restriction when his supervisor verbally counseled him on 28 Nov 07 for making a protected communication, as documented in a memorandum for record (MFR); and again, when his supervisor issued him a letter of counseling on 29 Feb 08 for making multiple protected communications. He was twice subjected to reprisal when his supervisor rescinded reserve man-days previously allotted to him for making a protected communication; and again, when his supervisor issued him a letter of counseling on 29 Feb 08 for making multiple protected communications. We note the IG recommended the applicant’s records be corrected by removal of the aforementioned MFR and LOC which formed the basis of their amended findings of restriction and reprisal, but did not substantiate his allegations that the command reprised against him when they: prevented him from being considered for multiple positions within the Active Guard/Reserve (AGR) Program; and provided negative references to potential employers. After a thorough review of the evidence of record and the applicant’s complete submission, including his response to the Air Force evaluations, we find the evidence presented does not establish that his unit reprised against him by preventing him from competing for AGR positions. First, we note the comments by the Air Force office of primary responsibility indicating that AFI 36-2132, *Full-Time Support (FTS) AGR Program*, requires a written release from a member’s commander in order to be eligible to apply for an AGR vacancy. The instruction provides commanders with wide latitude in the factors they consider when making a determination to release a member to compete for reassignment. These factors can include the needs of the organization, the member’s readiness for the position sought, or a variety of other factors. While the applicant provides evidence indicating that his relationship with members of his chain of command was tenuous, he has not provided any direct or even indirect evidence that reprisal motivated the decision to not release him. Moreover, even if one presumes the retaliatory animus as established in other personnel actions was present, it appears more likely than not that management would have taken the same action in not releasing other newly assigned personnel (and the applicant has not provided other instances of newly assigned personnel being released). While the evidence provided makes it clear that a serious personality conflict existed between the applicant and certain members of his chain of command, it fails to establish a nexus between the personality conflict and his command’s reluctance to release him to compete for full-time positions within the AGR program. Lastly, even if we were to assume for argument’s sake the failure to release him was a retaliatory act, we find the applicant has not met his burden of proof to demonstrate that he would have been selected. Specifically, the evidence he provides is statistical information which apparently describes his standing among fellow instructors, and as such, is insufficient to conclude he would have been selected for any of these positions, including the one in his own academic department. Any such selection would be purely speculative and speculation is an inadequate basis upon which to grant the requested remedy. As for the negative references, we find the evidence presented is not sufficient to establish the applicant’s supervisor’s motive in providing the recommendation was retaliation or that it was a knowingly false or inaccurate opinion of what he observed during the period of supervision. Therefore, absent a showing by the applicant that his unit’s decision to not release him to compete for AGR positions or the action of his supervisor in providing unfavorable references to potential employers were otherwise arbitrary, capricious, or an injustice, we find the applicant has been provided full and fitting relief in this regard and no further action by the Board is required in response to these allegations. We also note the applicant’s assertion, in response to the Air Force advisory, that his officer performance report (OPR), closing 14 Feb 08, was a possible reprisal action given the timing of his IG complaint. However, other than his own assertions, he has provided no evidence that would convince us the OPR was not an accurate description of his performance during the reporting period. Finally, we note the applicant’s request for an investigation into the lack of systemic control within the US Air Force Academy; however, we consider this to be outside the Board’s purview. In this respect, we note the Board’s authority to order an investigation is specific to an applicant’s allegations of reprisal as provided for in DoD Directive 7050.06, *Military Whistleblower Protection.* However, after a thorough review of the evidence, we conclude the reprisal allegations were properly and thoroughly investigated, reviewed, and disposed of by the IG. We note the applicant’s assertion that USAFA/CC’s action to amend some of the findings of the original Investigative Report was based on incomplete information; however, after a thorough review of the applicant’s complete submission and the evidence of record, we do not find the evidence presented sufficient to overcome the rationale expressed in USAFA/CC’s addendum to the Report of Investigation or to overcome the presumption of regularity that USAFA/CC would act only with adequate information. Therefore, in absence of evidence to the contrary, we find no basis to recommend granting his remaining requests.

5. 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 issues involved. Therefore, the request for a hearing is not favorably considered.

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THE BOARD DETERMINES THAT:

The pertinent military records of the Department of the Air Force relating to the APPLICANT be considered for promotion to the grade of lieutenant colonel (O-5) as a position vacancy candidate by a Special Board, under the provisions of 10 USC 1558, for the Fiscal Year 2008 United States Air Force Reserve (USAFR) Line Lieutenant Colonel Promotion Board.

It is further recommended that an appropriately modified version of the Promotion Recommendation Form (PRF) prepared for consideration by the Fiscal Year 2009 USAFR Line Lieutenant Colonel Promotion Board (V0509B) be utilized by the Special Board in evaluating the applicant’s potential to serve in the higher grade.

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The following members of the Board considered AFBCMR Docket Number BC-2010-02704 in Executive Session on 16 Dec 10, under the provisions of AFI 36-2603:

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 15 Jul 10, w/atchs.

Exhibit B. Applicant's Master Personnel Records.

Exhibit C. Letter, AFRC/A1A, dated 20 Aug 10.

Exhibit D. Letter, SAF/MRBR, dated 1 Oct 10.

Exhibit E. Letter, Applicant, undated, w/atchs.