

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2006-01883-2

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider his request for retroactive promotion to lieutenant colonel (O-5) based on racial disparity per the 2020 Inspector General Department of the Air Force Independent Racial Disparity Review.

RESUME OF THE CASE

On 21 Nov 06 and 10 Jan 07, the Board recommended granting the applicant's request for the following:

- a. His officer performance report (OPR) for the period 13 May 04 thru 12 May 05 be removed from his record.
- b. His letter of reprimand (LOR) and unfavorable information file (UIF) be removed from his officer selection record (OSR).
- c. His line number for lieutenant colonel be reinstated, and he receive back pay from 1 Jul 05.

The Board based their recommendation on the belief that the adverse actions taken against the applicant were an injustice. While a commander directed investigation (CDI) substantiated allegations resulting in the adverse actions, the Board noted the actions were initiated after the applicant filed an MEO complaint against his rater. The applicant's subsequent claim of reprisal was not substantiated largely because the adverse actions were not rendered by his immediate rater, the person he alleges reprised against him. However, the Board believed the reason for this was because the immediate rater was limited to the role of a recommending official based on his grade and that of the applicant. The Board also noted the staffing package submitted for removing the applicant from the promotion list included discussions of issues that legal authorities determined should not be factored into the final decision. The Board opined the inclusion and discussion of these issues created an element of doubt regarding the weight they were given in the final actions. Finally, the Board recognized the final decision to remove the applicant from the lieutenant colonel promotion list was made by the Secretary of the Air Force (Secretary) and that prior to reaching him for a determination, the recommended action was found legally sufficient after several legal reviews. However, while the action was technically legally sufficient, based on the totality of the evidence, the Board argued the action was unduly harsh and unjust.

On 21 Sep 07, the Assistant Secretary of the Air Force for Manpower and Reserve Affairs (Assistant Secretary) carefully reviewed the evidence of record and the Board's rationale for their recommendation for correction. He found the Board's recommendations regarding the OPR and LOR to be a reasonable exercise of their authority to correct an error or injustice. However, he did not find a sufficient basis to support the Board's recommendation to overturn the Secretary's decision to remove the applicant's name from the lieutenant colonel promotion list. He noted that all the salient facts the Board considered were available to the Secretary in reaching his decision. Although the Board argued there was a nexus between the complaint filed by the applicant against his rater and the adverse actions the applicant subsequently received, the Assistant Secretary did

not share that view. He found the panel's only basis to support relief was its disagreement with the merits of the Secretary's decision. Therefore, adopting the panel's recommendation would inappropriately allow the board to substitute its judgement for that of the Secretary. The Assistant Secretary exercised his discretionary authority choosing not to accept the Board's recommendation to reinstate the applicant's promotion. Instead, he directed the applicant receive promotion consideration by special selection board (SSB) for CY06 and any subsequent board for which the OPR and LOR were a matter of record.

On 27 Sep 07, the AFBCMR notified the applicant of the final decision and the Assistant Secretary's rationale.

On 10 Jan 08, the applicant's spouse solicited support from the Secretary for reinstatement of her husband's promotion to lieutenant colonel. On 28 Jan 08, the Acting Executive Director of the AFBCMR determined the spouse's letter did not contain new evidence warranting further consideration by the Board.

On 20 Feb 08, the applicant filed a Congressional inquiry requesting support for reinstatement of his promotion to lieutenant colonel. The Assistant Secretary's decision was upheld.

On 28 Feb 09, the applicant was honorably discharged from active duty, and on 1 Mar 09, he was retired in the rank of major (O-4). He was credited with 20 years and 18 days of active service.

On 15 Jan 13, the applicant appealed to the President of the United States (POTUS). He indicated he received a favorable recommendation from the Board to reinstate his promotion, but in an unprecedented action, the Assistant Secretary chose not to implement the Board's recommendation forcing him to retire as a major. He named the applicant of a similar AFBCMR case (BC-2003-01270, at Exhibit J) and questioned how such an action could occur.

On 20 Mar 13, according to documentation provided by the applicant, the Secretary of the Air Force Office of Legislative Liaison responded to the White House inquiry. They advised the applicant that under 10 U.S.C. § 1552, the Secretary is granted authority to alter military records to correct errors or remove injustice. Although the Secretary must act through the Board, the law specifically requires the Secretary to establish procedures for how the Board operates. The federal courts have affirmed that in such procedures the Secretary may specify whether he or she retains any of the authority delegated to the Board. In accordance with AFI 36-2603, *Air Force Board for Correction of Military Records*, dated 1 Mar 96, "the Secretary may direct such action as he or she deems appropriate on each case..." Further, if the Secretary "does not accept the Board's recommendation, the decision will be in writing and will include a brief statement of the grounds for denial." Separately, under an amendment to Headquarters Air Force Mission Directive 1-24, *Authority Relating to the Correction of Records*, dated 25 May 12, the Secretary delegated to the Assistant Secretary the authority to accept or reject recommendations of the Board. Therefore, the brief statement of the grounds for denial came from the Assistant Secretary.

For an accounting of the applicant's earlier requests and the rationale of the earlier decisions, see the AFBCMR Letter and Record of Proceedings at Exhibit H.

On 14 Sep 21, the applicant requested reconsideration of his request for promotion to lieutenant colonel, effective 1 Jul 05, and all associated back pay. He contends he was punished for asking why Blacks and Hispanics were not given Air Force Reserve Officer Training Corps (AFROTC) scholarships despite meeting qualifications. The base MEO office confirmed the detachment commander made derogatory comments about minorities and often asked minority students to practice their military marching to "Dixie," a very old southern song. On 28 Dec 20, he submitted an email to the Air Force Chief of Staff (CSAF) regarding the Air Force Inspector General Racial Disparity Review. He provided information to CSAF regarding his AFBCMR case in which the

Board granted his request to remove his OPR and reinstate his promotion to lieutenant colonel effective 1 Jul 05, with back pay. However, despite overwhelming evidence, the Assistant Secretary decided not to accept the recommendation. He believes these are the type of actions the Air Force Inspector General is looking to rectify and make whole. On 16 Feb 21, the Secretary of the Air Force Inspector General (SAF/IG) responded to the applicant's email inquiry informing him he could seek reconsideration through the AFBCMR.

In support of his reconsideration request, he submitted the following new evidence: 1) a copy of the SAF/IG email, dated 16 Feb 21; 2) a memorandum from a former evaluator/vice commander, dated 10 Mar 08; and 3) an unsigned statement from his former counsel, dated 31 Mar 09. Counsel claimed the SSB did not give the applicant a fair chance for promotion due to the "hole" in his record created by the removal of the contested OPR. He further claimed the applicant's subsequent OPR ending 23 Jan 06, was tainted by unfounded allegations since his former supervisor was biased against him and would have provided input to the new rating chain. Finally, Counsel cited AFBCMR case BC-2002-00938 as precedent for direct promotion.

The applicant's complete submission is at Exhibit I.

The applicant cites the following AFBCMR cases in support of his request:

BC-2002-00938 (at Exhibit J): On 22 Jul 03, the Board recommended the applicant's direct promotion to lieutenant colonel. As a result of the applicant's retroactive promotion to major and reinstatement after more than five years, he was considered for promotion to lieutenant colonel by three SSBs with no record of performance as a major. The Board noted that SSBs are fundamentally fair and equitable; however, the applicant's abbreviated record precluded a fair comparison with other promotion eligibles. The Board opined this case was so exceptionally rare, it was impossible for an SSB to restore equity; therefore, the extraordinary solution of a direct promotion was warranted. In the current case, the applicant had continuous service and an established record of performance determined to be sufficient for equitable SSB consideration.

BC-2003-01270: On 2 Aug 04, the Board recommended the applicant's records reflect he was not retired in the rank of brigadier general (O-7), but continued to serve on active duty; his name was not removed from the list of officers selected for promotion by CY95 Major General Selection Board and confirmed by the Senate; he was promoted to major general (O-8); and he retired in the rank of major general after the statutory time-in-grade requirement. Subsequently, the General Counsel of the Department of Defense (DoD) advised the Acting Secretary that the action taken by the AFBCMR was *ultra vires* (beyond the authority of the Board) and without legal effect. The Air Force General Counsel advised the Director of the Air Force Review Boards Agency (AFRBA) that given the DoD General Counsel's role as the final legal authority for DoD, his determination was binding upon the Director, AFRBA and the Board. The Director, AFRBA notified counsel the applicant's request was not within the purview of the AFBCMR, and the Board was not in a position to take further action. The decision was final (Exhibit J). In this instance, the cited case and current case are similar only in the regard that the Board's recommendations for promotion reinstatement were overturned. However, there are unique differences in the rank of the applicants as well as the circumstances leading to their removal from promotion lists.

APPLICABLE AUTHORITY/GUIDANCE

The Inspector General Department of the Air Force, Report of Inquiry (ROI), Independent Racial Disparity Review, Dec 20. The Secretary of the Air Force, CSAF, and Chief of Space Operations directed the Department of the Air Force Inspector General (DAF IG) to assess racial disparity in military discipline processes and personnel development and career opportunity as they pertain to black Airmen and Space Professionals. For purposes of this review, "racial disparity" refers to a noted data difference between races. Specifically, this Review defines racial disparity as existing

when the proportion of a racial/ethnic group within a subset of the population is different from the proportion of such groups in the general population.

The first Independent Racial Disparity Review, released in Dec 20, identified and validated 16 specific disparities for Black/African American Airmen and Guardians. The review confirmed racial disparity exists in law enforcement apprehensions, criminal investigations, military justice, administrative separations, placement into occupational career fields, certain promotion rates, professional military educational development and leadership opportunities. Since that time, stakeholders have been conducting root-cause analysis and have begun implementing corrective measures. Among the report's recommendations is the need for unconscious bias mitigation training for panels, commanders, selection boards, and senior raters. Analysis shows even when all potential root-causes of the disparities are identified and mitigated, there are some outcomes that do not trace directly to an identifiable barrier. In these instances, unintentional and unconscious bias is a possible factor in some outcomes. Therefore evidence-based training is recommended to ensure awareness and help mitigate potential contributing factors.

The second IG disparity review ROI released in Sep 21, focused on gender and ethnicity, to include Hispanics, Latinos, Asians, American Indians, Alaska Natives, Native Hawaiians and Other Pacific Islanders. The second review also referenced and compared data from the prior report on racial disparity involving Black/African American Airmen and Guardians. The second review is an extension of the DAF's initial racial disparity review and addressed disparities in discipline, investigation, and personnel opportunities for these groups. Among the groups examined, the second IG disparity review revealed racial, ethnic, and gender disparities, particularly in accessions, retention, opportunities, and to a relatively lesser extent, disciplinary actions. Additionally, based upon survey feedback and group discussions, racially and ethnically diverse and female service members indicated they face barriers and challenges others may not experience.

While the presence of a disparity alone is not evidence of racism, sexism, discrimination, or disparate treatment, it presents a concern that requires more in-depth analysis and corrective action. The data identified in this review shows race, ethnicity, and gender are correlating factors; however, they do not indicate causality, and the review does not address why the disparities exist. This report's primary focus was on identifying areas of disparity for further analysis.

Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*.

Roles and Responsibilities.

1.1. In accordance with 10 U.S.C. § 1552, *Correction of military records: claims incident thereto*, the Secretary of the Air Force is authorized to correct an error or remove an injustice. Such corrections shall be made by the Secretary acting through boards of civilians in the executive part of the Department of the Air Force.

1.2. In accordance with Headquarters Mission Directive (HAFMD) 1-24, Assistant Secretary of the Air Force (Manpower and Reserve Affairs), the Assistant Secretary exercises the authority under 10 U.S.C. § 1552 on behalf of the Secretary. Additionally, HAFMD 1-24 Addendum-C, *Re-Delegation of Direction and Authority to Act on Certain Applications and Complaints HAFMD 1-24, Assistant Secretary of the Air Force (Manpower and Reserve Affairs)*, the Assistant Secretary has further delegated this authority to the Director of the Air Force Review Boards Agency (AFRBA) and Executive Director, Air Force Board for Correction of Military Records (AFBCMR).

AFI 36-2501, *Officer Promotions and Selective Continuation*. Special Selection Boards (SSB) are convened to consider officers who were improperly considered, or not considered, by one or

more promotion boards. The AFBCMR or a federal court can direct an officer for consideration by an SSB. SSB consideration is based on legal, administrative, and material errors.

FINDINGS AND CONCLUSION

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board was unconvinced the evidence presented demonstrates an error or injustice. In his initial application, the applicant claimed he was punished because he raised questions regarding disparate treatment of minorities and reported his rater for making racially discriminating remarks. He received an LOR, referral OPR, and was removed from the lieutenant colonel promotion list. After considering all the evidence presented, the Board recommended full relief. While the OPR and LOR were removed, his promotion to lieutenant colonel was not reinstated. In his request for reconsideration, the applicant seeks promotion reinstatement based on the results of the Independent Racial Disparity Review. Allegations of racial disparity warrant careful deliberation; therefore, the Board considered the entire case file, the applicant's contentions, and the Independent Racial Disparity Review ROI. The Board acknowledges racial discrimination and bias exist; however, the applicant failed to provide evidence to establish that it precipitated the events in contention. In this respect, substantiated CDI findings clearly document the behavior used to form the basis for the LOR and referral OPR, which ultimately led to his removal from the promotion list to lieutenant colonel. Although, the Assistant Secretary directed the referral OPR and LOR be removed from the record, he concluded the evidence supported the conduct addressed in the LOR. Nevertheless, in the interest of justice the Assistant Secretary directed the applicant receive SSB consideration for promotion boards in which the OPR and LOR were a matter of record. Subsequently, the applicant was considered for promotion to lieutenant colonel via SSB, but not selected. In a statement dated 31 Mar 09, the applicant's former counsel contends the SSB did not give the applicant a fair chance for promotion due to the "hole" in his record created by the removal of the contested OPR, and that his subsequent OPR ending 3 Jan 06 was tainted by unfounded allegations and biased input from his former supervisor. The Board was not convinced and found the contentions uncorroborated and without merit. The SSB process and results are considered fair and equitable and there was no evidence the applicant's record did not receive proper consideration.

The applicant and his former counsel cite prior AFBCMR cases they contend are similar, and set established precedent for the applicant's direct promotion; however, the Board disagrees. The Board is charged to independently review each case based on its own merit and does not recommend relief in one case simply because circumstances appear similar to another case. The Board reviewed facts in the cited cases and finds the circumstances in those cases vary significantly than those of the applicant. Moreover, after removal of the LOR and OPR, the applicant was afforded fair consideration by an SSB. Although he was not selected for promotion, non-selection alone is not a basis for direct promotion.

Finally, the applicant contends that in an "unprecedented action," the Assistant Secretary chose not to implement the Board's initial recommendation to reinstate his promotion. While such an action may be considered the exception, rather than the rule, it is certainly not unprecedented for the Secretary or his/her delegatee to not accept a recommendation by the Board. The Board operates under the authority of the Secretary and provides recommendations to the Secretary. Quite simply, the Board's recommendations are just that, recommendations. After reviewing the evidence of record, the Assistant Secretary acting on behalf of the Secretary, determined the Board's recommendation to reinstate the applicant's name on the promotion selection list was not supported by sufficient evidence and inappropriately substituted the Board's judgement for that of the Secretary. Despite numerous inquiries and appeals to congressional representatives, CSAF,

and POTUS, the Secretary's and Assistant Secretary's decisions have been upheld. The Board conducted an exhaustive review of voluminous evidentiary documents, including but not limited to, prior submissions, cited cases, investigative reports, and new evidence submitted by the applicant. However, the Board did not find evidence sufficient to disturb the previous decisions by the Secretary or Assistant Secretary acting within their discretionary authority. Therefore, the Board recommends against correcting the applicant's records.

4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

RECOMMENDATION

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

CERTIFICATION

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2006-01883-2 in Executive Session on 28 Mar 23:

, Panel Chair
, Panel Member
, Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit H: Original Record of Proceedings, w/atchs, dated 17 Jun 06.
Exhibit I: Application, DD Form 149, w/atchs, dated 14 Sep 21.
Exhibit J: Documentary evidence, including relevant excerpts from official records.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

X

Board Operations Manager, AFBCMR