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## ADDENDUM TO RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

XXXXXXXXXXXX

**DOCKET NUMBER:** BC-2012-03871

**COUNSEL:** XXXXXXXXXX

**HEARING REQUESTED:** YES

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### APPLICANT'S REQUEST

By memorandum dated 14 July 2021, through counsel, the applicant states his application is not a request for reconsideration. His amended requests are as follows:

1. He receive credit for his deployment in support of Operation ENDURING FREEDOM (OEF). **(Will be administratively corrected)**
2. His missing mandatory AF Form 77, *Letter of Evaluation (LOE)*, for the period 2 September 2003 through 13 December 2003, be added to his records.
3. His officer performance report (OPR) for the period of 10 December 2002 through 9 December 2003 be corrected in compliance with Air Force policies.
4. He receive appropriate promotion and Professional Military Education (PME) consideration with corrected records.
5. He receive consideration of all in-residence PME with corrected records.

### RESUME OF THE CASE

On 1 February 2005 (BC-2005-00525, at Exhibit M), the applicant submitted an application to the AFBCMR requesting his nonselection for promotion by the Calendar Year (CY) 2004B Lieutenant Colonel Central Selection Board (CSB) be rescinded and he be considered in-the-promotion zone (IPZ) for the CY 2005B Lieutenant Colonel CSB. He contended he was not afforded fair consideration during the CY 2004B Lieutenant Colonel CSB due to: (1) graduate-level degrees were given disproportionate weight, and (2) his record did not have a letter to the board addressing a graduate-level degree and his attempts to obtain one.

On 4 March 2005, the AFBCMR directed the applicant's record be corrected to show that he was not considered for promotion by the CY 2004B Lieutenant Colonel CSB, and he was considered IPZ by the CY 2005B Lieutenant Colonel CSB.

On 1 April 2006, according to Special Order **Work-Product**, the applicant was promoted to the grade of O-5, effective and with a date of rank (DOR) of 1 April 2006.

On 1 October 2011, according to Special Order **Work-Product**, the applicant was promoted to the grade of O-6, effective and with a DOR of 1 October 2011.

On 30 April 2012, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, the applicant was released from the Regular Air Force, in the grade O-6. His narrative reason for discharge is "Vol Retirement: Sufficient Service for Retirement."

On 1 May 2012, according to Special Orders No. **Work-Product**, dated 20 September 2011, the applicant was retired in the grade of O-5. He was credited with 20 years and 16 days of active service.

On 26 Aug 12, the applicant submitted the following requests:

1. His OPR for the period 10 December 2002 through 9 December 2003 be voided and removed from his record.
2. His DOR of promotion to the grade of O-5 be changed from 1 April 2006 to 1 April 2005.
3. His DOR of promotion to the grade of colonel (O-6) be changed from 1 October 2011 to 1 October 2010.
4. He be granted back pay and allowances for the adjusted DORs.
5. He be granted any other benefits or entitlements that would have accrued with promotion on the CY 2004B Lieutenant Colonel board and promotion on the IPZ Colonel board.
6. His retirement grade be adjusted to reflect O-6.
7. His retirement pay and allowances be adjusted to account for the corrected DORs.

On 21 February 2013, the Board considered and denied the requests, finding the applicant had provided insufficient evidence of an error or injustice to justify relief. The applicant contended that the contested OPR contained factual errors, his rater had insufficient supervision and engaged in reprisal, and that his sustained record of performance demonstrated he would have been selected for promotion during the CY 2004B Lieutenant Colonel CSB except for the reprisal. However, the contentions were not supported by evidence sufficient in warranting the Board override the recommendation and rationale of the offices of primary responsibility.

In a letter dated 8 August 2013, the Chief of Staff, Office of the Under Secretary of Defense responded to the applicant's request for review of the Board's decision. After careful consideration, it was determined the Board had not acted arbitrarily, capriciously, contrary to law, or that its determination was unsupported by substantial evidence. Accordingly, the Board's decision was upheld and the action on behalf of the Secretary of Defense was considered final.

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

On 11 December 2013, the applicant requested reconsideration of his request to remove his OPR for the period ending 9 December 2003, again claiming the rater did not have the required 120 days to render a valid report. He referenced two memoranda from the Secretary of the Air Force Office of Legislative Liaison, both of which responded to Congressional inquiries on behalf of the applicant regarding the contested OPR. In the memorandum dated 10 May 2013, it was determined his rater had 219 days of supervision and in the memorandum dated 26 August 2013, it was determined the rater had 143 days of supervision. On 10 February 2015, the AFBCMR determined the applicant's request did not meet criteria for reconsideration, indicating reconsideration is authorized only where newly discovered relevant evidence is presented which was not available when the application was submitted. In addition, the reiteration of facts previously addressed by the Board, uncorroborated personal observations, or additional arguments on the evidence of record are not adequate grounds for reopening a case.

On 28 September 2016 (BC-2016-03975, at Exhibit M) the applicant submitted a request to the Board requesting his records be corrected to include his assignment to the 11th Reconnaissance Squadron (RS) for RQ-1 Predator Basic Pilot Qualification training and his permanent change of assignment (PCA) to the 15 RS upon completion of training.

On 22 May 2019, the AFBCMR recommend his record be corrected and a directive was issued.

For an accounting of the applicant's reconsideration request and the rationale of the earlier decision, see the AFBCMR Letter at Exhibit K.

On 25 April 2020, the applicant again requested reconsideration of his request. In a 20-page brief, through counsel, the applicant makes the following contentions:

On 10 December 2002, according to Special Order *Work-Product*, dated 24 September 2002, he was ordered to Extended Active Duty and assigned to the 11 RS to attend a formal training course. On 26 May 2003, he was transferred from 11 RS to 15 RS after completing formal training. However, his assignment to the 11 RS, subsequent PCA, change in reporting official (CRO), and newly assigned supervisory responsibilities were neither correctly documented in his records, nor properly considered by any CSB convening in 2004 or later.

He deployed to Pakistan from 2 September 2003 to 13 December 2003 and served as a squadron-level commander in a combat zone in support of OEF. His Meritorious Service Medal (MSM) and other decorations awarded for his distinguished service during the 2003 deployment were delayed and not processed in accordance with AFI 36-2803, *The Air Force Military Awards and Decorations Program*, timeliness goals. A mandatory LOE was completed by his supervising group commander; however, the LOE was not placed in his officer selection record (OSR) as required by Air Force policy. As a result, one or more CSBs convened without considering his significant accomplishments serving as a commander in a combat zone. In addition, the applicant cites a similar case (BC-2010-01212), in which AFPC applied policy stating the applicant may exercise an option to include an LOE with a letter to CSBs when the LOE is not otherwise part of the OSR.

His OPR for the period ending 9 December 2003, failed to comply with AFI 36-2406, *Officer and Enlisted Evaluation Systems*. Air Force policy mandates raters have a minimum of 120 days of supervision to render a valid OPR. In 2019 (BC-2016-03975, at Exhibit M), the AFBCMR directed his record be corrected to reflect his assignment to the 11 RS and the previously omitted PCA. Official records now indicate the maximum period of supervision the rater can claim on the contested OPR is 97 [sic] days, from 26 May 2003 through 1 September 2003. Therefore, the OPR considered by all CSBs after CY 2004B was invalid. The OPR errors prevented all CSBs from CY 2004 and later from accurately assessing his leadership and duty performance for at least 268 days of the reporting period when he was supervised by officials other than the rater who signed the OPR.

The errors within his personnel records had a compounding adverse impact for which there is no mechanism for correction other than direct promotion. He cites a similar case (BC-2002-02532, at Exhibit M), indicating the Board stated that direct promotion may be warranted if "a strong showing that the officer's record cannot be reconstructed in such a manner so as to permit competing for promotion on a fair and equitable basis." Further, the Board concluded a direct promotion may be warranted "had the original errors not occurred, the probability of his [the applicant] being selected for promotion would have been extremely high."

His record cannot be reconstructed in a manner that enables competition on a fair and equitable basis. No rater had the requisite 120 days of supervision required to complete a valid OPR for the period 10 December 2002 to 9 December 2003, his missing LOE cannot be reconstructed,

and he did not receive the decorations earned during the 2003 deployment prior to the CY 2004B Lieutenant Colonel CSB. Given the applicant's superior record of performance, the most fair and appropriate remedy is direct promotion to O-5, as if selected by the CY 2004B Lieutenant Colonel CSB and direct promotion to O-6, as if selected by the CY 2009D Colonel CSB (should he not be selected for colonel as a below-the-promotion zone (BPZ) eligible).

In support of his reconsideration request, the applicant submitted the following new evidence:

1. A memorandum for record (MFR) dated 12 September 2017, signed by his former deployed rater, stating he did not retain a copy of the applicant's LOE and while he cannot recreate the content, he recalled specific stratification statements and validated performance bullets cited in the applicant's MSM.
2. An MFR dated 9 July 2017, signed by the rater of the contested OPR. He confirmed his period of supervision and the applicant's deployment. He stated that after reviewing the documentation provided by the applicant and rules of supervision outlined in AFI 36-2406, he concurs with correcting and updating the contested OPR.
3. AFBCMR Directive dated 17 June 2019 (BC-2016-03975, at Exhibit M), correcting the applicant's record to reflect a PCA from 11 RS to 15 RS effective 26 May 2003.

The applicant's complete submission is at Exhibit L.

On 19 February 2021, AFPC/DP3AM determined they were able to verify Foreign Service in Pakistan from 2 September 2003 to 13 December 2003 for 3 months and 12 days. Accordingly, the applicant's DD Form 214 will be corrected following the Board.

For more information, see the excerpt of the applicant's record and documentary evidence at Exhibit M.

## **APPLICABLE AUTHORITY/GUIDANCE**

Title 10, United States Code, Section 1168: Discharge or release from active duty: limitation; DoDI 1336.01, *Certificate of Release or Discharge from Active Duty (DD Form 214/5 Series)*; AFI 36-3202, *Certificate of Release or Discharge from Active Duty (DD Form 214/5 Series)*; DD Form 214 Total Force Personnel Services Delivery Guide. The DD Form 214, *Certificate of Release or Discharge from Active Duty*, is prepared in accordance with the aforementioned publications and is used to record qualifying active duty service. Foreign Service locations are not an authorized entry on the DD Form 214. Foreign Service is annotated in increments of years, months, and days.

AFI 36-2406, *Officer and Enlisted Evaluation Systems*, and Personnel Services Delivery Memorandum (PSDM) 09-12, *Deployed Commander Letter of Evaluations (LOEs) (Force Management Element; Functional Category: Evaluations)*. LOEs may be written to document periods of ratee performance too short to require a performance report, or to document periods when someone other than the designated rater supervises the ratee. Evaluators may quote or paraphrase information contained in LOEs. LOEs closing during the period of the performance report will accompany the OPR/EPR notice through the rating chain and remain with the notice and report until received by the Military Personnel Flight (MPF). Once the MPF determines the report is acceptable for processing to file, they return the LOE to the Commander Support Staff to be given to the ratee. (Note: LOEs are transitory reports that are not filed in any personnel record group.)

PSDM 09-12 consolidates and provides additional guidance in processing deployed commander LOEs, to include the use and provisions of the newly revised AF Form 77. This program was implemented by MPF Memorandum 04-42 dated 25 October 2004, effective with the 2004 Air Expeditionary Force (AEF) Cycle 5, states an LOE is mandatory for all deployed officers (Active Duty, Guard, and Reserve) through the grade of O-6 serving as commanders for 45 days or more in support of named operations. Deployed commanders are defined as those officers who occupy squadron, group, or wing commander positions, and are appointed by G-Series orders. This policy does not grandfather officers who served in deployed commander positions prior to the implementation period.

An exception applies if someone other than the officially designated rater who prepares an LOE with referral comments. The ratee addresses his or her comments, if any, along with the LOE, to his or her current rater. If the rater considers the referral comments serious enough to warrant permanent recording, the rater prepares a performance report and the LOE becomes a referral document attached to the report. If the rater believes a report is inappropriate, he or she returns the LOE and any rebuttal comments to the ratee.

AFI 36-2406 states, enter the number of days the rater supervised the ratee during the reporting period on the performance report. Deduct all periods of 30 or more consecutive calendar days during which the ratee did not perform normal duties under the rater's supervision because either the ratee or the rater was TDY, on leave, in patient status, in classroom training.

AFI 36-2401, *Correcting Officer and Enlisted Evaluation Reports*, Table 2, *Correcting Minor Errors on Evaluation Reports*. If the request is to correct an error in the "from" or "thru" date of the report, the number of days of supervision, or the reason for the report is, considered a minor correction, the MPF (or Commander's Support Staff in the absence of the a MPF) who knows of an error that is correctable under this table should initiate corrective action.

Title 10, United States Code, Section 531 (10 U.S.C § 531): Original Appointments of Commissioned Officers. Original appointments in the grades of major (O-4) , lieutenant colonel (O-5) , and colonel (O-6) in the Regular Army, Regular Air Force, and Regular Marine Corps and in the grades of lieutenant commander, commander, and captain in the Regular Navy shall be made by the President, by and with the advice and consent of the Senate.

According to Under Secretary of Defense (Personnel and Readiness) memorandum dated 10 February 2015, only the President may appoint Regular officers above the grade of O-3 and Reserve officers above the grade of O-5 following Senate confirmation. Only the Secretary of Defense may appoint all other officers because Congress has vested such appointment authority in the President alone, and the President has assigned that function to the Secretary of Defense. This decision affirms that Military Department correction boards do not have the authority to remedy perceived errors or injustices by correcting records to show that an officer has been appointed to a certain grade when the officer has not been appointed to that grade by the President or the Secretary of Defense. Boards may only make such a correction to reflect that a proper appointment has occurred. They may also adjust the date of rank of an officer who has been properly appointed.

AFI 36-2501, *Officer Promotions and Selective Continuation*, dated 16 July 2004. Special Selection Boards (SSB) are convened to consider officers who were improperly considered, or not considered, by one or more promotion boards. The Air Force Board for Correction of Military Records or a federal court can direct an officer for consideration by an SSB. SSB consideration is based on legal, administrative, and material errors. An SSB will not be considered if, by exercising reasonable diligence, the officer should have discovered the error or omission and could have taken corrective action before the originally scheduled board convened.

Eligible officers are responsible for determining eligibility for consideration by various promotion zone considerations - BPZ, IPZ, and above-the-promotion zone (APZ). In addition, they are responsible for ensuring the accuracy of their military personnel data system data and OSR, prior to board convening date. As a minimum, the officer must review the Officer Preselection Briefs (OPB) for accuracy of personnel data and correct any discrepancies prior to the board. They receive promotion recommendation from the senior rater approximately 30 days prior to the board, review PRF and OPRs for accuracy and discuss any concerns with rating officials, and point out any omissions of facts (e.g. significant achievements, wrong duty title and/or duty description). Officers consider submitting a letter to the board, if applicable, and should report any errors to the MPF Career Enhancement Element or other OPR listed on the OPB instruction sheet.

AFI 36-3203, *Service Retirements*. To voluntarily retire in a grade above O-4, a commissioned officer generally must have served satisfactorily in that higher grade with at least three years time in grade; otherwise the Air Force will authorize the retirement in the next lower grade as directed by 10 U.S.C. § 1370, *Commissioned Officers: General Rule; Exceptions*, unless a waiver is granted under some provision of law.

## **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 remains unconvinced the evidence presented demonstrates an error or injustice. Although counsel states the new evidence should not be processed as a reconsideration request, the Board disagrees. Based on a thorough assessment of the applicant's AFBCMR applications, the Board determined this request involves matters related to a previous application in which the Board rendered a decision. The applicant believes his record cannot be constructed in a manner that enabled competition on a fair and equitable basis and the only reasonable remedy would be to correct the record to show he was directly promoted to O-5 and O-6 as if selected by earlier CSBs. However, the Board disagrees. The Board considered the applicant's entire case file to include the new evidence submitted by the applicant; however, it is not sufficient to grant relief. The applicant contends his 2003 OEF deployment was not properly documented in his record and considered during CSBs. However, the Board notes the applicant's OPR closing 9 December 2003 lists accomplishments from the deployment and the OPR was considered during the CSBs for which the applicant was selected for promotion to O-5 and O-6. In addition, AFPC determined an error exists with the Foreign Service on the applicant's DD Form 214, dated 30 April 2012, and will administratively correct the document to reflect credit for his deployment.

The applicant further contends his contested OPR is not in compliance with Air Force policy; therefore, the OPR considered by all CSBs in 2004 and later should be invalidated. The applicant provides a memorandum of support from his former rater concurring with the applicant's assessment that he lacked the required supervision. The Board notes the memorandum is dated 9 July 2017, over 13 years after the report was rendered. Both the applicant and former rater claim insufficient supervision as a basis to correct the report; however, neither provides an explanation as to why the alleged errors were not addressed or corrected at the time the report was rendered. In fact, in his 2005 AFBCMR application, the applicant contended the reasons for his nonselection for the CY 2004B Lieutenant Colonel CSB was due to his limited time on active duty and the unfair weight given to advanced degrees. The validity of his OPR was not contested. The Board granted his request to remove the 2004 nonselection and that he be considered IPZ by the CY 2005B Lieutenant Colonel CSB. It appears the applicant's request and the Board's correction worked to his favor and he was subsequently

promoted to O-5 and O-6 with the contested OPR included in his OSR. While he was the beneficiary of the Board's recommendation, the applicant now argues the same OPR that was included in his record is now the cause of unfair consideration for promotion. There is no evidence the applicant took issue with the OPR until 2012 after he voluntarily retired (and nearly nine years after the closeout date) when he filed the first AFBCMR application contesting the report. Air Force policy states that an eligible officer is responsible for ensuring the accuracy of their military record and correcting any discrepancies prior to a board convening. Additionally, policy affords an officer the opportunity to send a letter to each selection board to address any concerns about their record. This Board is not persuaded the OPR is an unfair or inaccurate assessment of the applicant's performance for the reporting period, the applicant exercised reasonable diligence to correct any discrepancies in a timely manner, or that the report should be changed or removed.

The applicant also contends his deployed supervisor completed a "mandatory" LOE documenting his performance; however, the LOE was not placed in his OSR as required by Air Force policy. As noted above, PSDM 09-12 indicates the practice of adding LOEs to OSRs for deployed commanders was not implemented until October 2004, and the policy did not grandfather officers who served in deployed commander positions prior to the implementation period. The applicant deployed prior to the implementation period; therefore, his LOE is not considered mandatory and cannot be added to his OSR or permanent record. Furthermore, the applicant cites a similar case (BC-2010-01212), in which AFPC applied policy stating the applicant may exercise an option to include an LOE with a letter to CSBs when the LOE is not otherwise part of the OSR. However, as in the cited case, the applicant did not exercise his right to do so.

The Board also took note of the applicant's assertion AFBCMR case BC-2002-02532 was looked upon favorably and similar consideration should be applied in his case. However, the Board notes that each case is considered on its own merit. The Board reviews and analyzes evidence in each case and does not recommend relief in one case simply because circumstances appear similar to another case. The Board has reviewed the facts in the cited case and finds the circumstances of the case distinctly different; therefore, the Board finds no reason to grant relief based on what the applicant argues is a similarly situated circumstance. Specifically, in the cited case the Board stated that direct promotion may be warranted if a strong showing that the officer's record cannot be reconstructed and the probability of the applicant being selected for promotion would have been extremely high. However, the Board did not grant direct promotion in the cited case. Furthermore, the Board normally only substitutes its judgment and authority for that of a duly constituted promotion Board in the most egregious of circumstances where it has been established that an applicant did not and cannot receive fair and equitable promotion consideration and the applicant has strong support validating their qualification for promotion to the higher grade. The Board does not find these factors in this case.

Lastly, the Board considered the applicant's numerous contentions and did an extensive review of the entire case file, including new evidence and a review of the cited cases. However, based on the totality of the evidence, the Board finds the applicant failed to sustain his burden of proof in establishing he exercised due diligence when he discovered the alleged errors within his record and took timely action. Given there is no basis to recommend approval of his previous requests, there exists no basis to recommend relief for the applicant's new or amended requests. Therefore, beyond the administrative correction that will be made to his record, the Board recommends against correcting the applicant's record.

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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2012-03871-3 in Executive Session on 23 September 2021:

, Panel Chair  
, Panel Member  
, Panel Member

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

Exhibit H: Record of Proceedings, w/ Exhibits A-G, dated 21 February 2013.  
Exhibit K: Denial of Reconsideration, w/ Exhibits I-J, dated 10 February 2015.  
Exhibit L: Application, Reconsideration DD Form 149, w/atchs, dated 25 April 2020.  
Exhibit M: 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 AFI 36-2603, paragraph 4.11.9.

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Board Operations Manager, AFBCMR