

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXXXXXXXXXX.

DOCKET NUMBER: BC-2016-03927-3

COUNSEL: XXXXXXXXXXXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider his request for the following:

1. He receive a new "Meets Standards" officer performance report (OPR) for the period Aug 09 to Aug 10.
2. He be awarded a Meritorious Service Medal, with First Oak Leaf Cluster (MSM, w/1 OLC) for the period Aug 06 to Aug 09.
3. He receive a new AF Form 77, *Letter of Evaluation (LOE)*, for the period 2010 to 2012.
4. He be considered by a special selection board (SSB) for the CY12 Air Force Reserve Colonel Line and Nonline Selection Board.
5. He be provided an opportunity to review all documents that the SSB will consider and he be permitted to submit a supplemental statement to the SSB.

RESUME OF THE CASE

The applicant is a retired Air Force lieutenant colonel (O-5). He was placed on the Air Force Retired List in 2021 (age 60).

On 27 Jun 12, the applicant requested the Board (BC-2012-03153) remove from his records his letter of admonishment (LOA) dated 10 Mar 10, letter of reprimand (LOR) dated 23 Mar 10, revocation of his security clearance, unfavorable information file (UIF) and any adverse documents in his officer selection record (OSR) for the period Aug 03 through 15 Oct 10. He also requested his OPR for the period ending 3 Aug 10 be replaced with a new "Meets Standards" OPR, he be awarded inactive duty training (IDT) points, he be awarded an MSM, w/1 OLC and that he be reinstated into the Air Force Reserve. The applicant contended he was falsely accused of filing fraudulent AF IMT 40A, *Record of Individual Inactive Duty Training*, requests. Although exonerated, his supervisors continued to investigate him and engaged with his civilian airline employer for an alleged abuse of military leave. On 25 Apr 13, the Board found there were personality conflicts between the applicant and certain members of his chain of command based on the commander directed investigations (CDI). The Board denied the request for award of the MSM w/1 OLC; however, granted his remaining requests. The Board recommended his OPR for the period of 4 Aug 09 through 3 Aug 10 be void and replaced with a new "Meets Standards" OPR. The applicant was also awarded 36 non-paid IDT points for his retention/retirement (R/R) year 4 Aug 08 to 3 Aug 09, 119 paid IDT points for each R/R years 4 Aug to 3 Aug 11, 4 Aug 11 to 3 Aug 12, 4 Aug 12 to 3 Aug 13. The Board also directed he be reassigned to an Air Force Reserve

Category E participation program position and directed he be considered for promotion to colonel by a SSB for the CY12 Air Force Reserve Colonel Line and Nonline Selection Board.

On 16 Dec 14, the Board reconsidered the applicant's request (BC-2012-03153-2) for award of the MSM w/1 OLC and additional IDT points. The Board again denied the request for award of the MSM, w/1 OLC. The Board concluded there was no evidence to support he was recommended for the MSM w/1 OLC and found no compelling basis to recommend awarding the MSM w/1 OLC. However, the Board awarded an additional 79 paid IDT points for his R/R year 4 Aug 14.

The applicant's records includes a "Meets Standard" OPR for the reporting period 3 Aug 08 to 2 Aug 09.

The applicant's records includes an AF Form 77, certified true copy dated 23 Dec 15, for the period 3 Aug 09 through 2 Aug 10. It states no evaluation was available for the period 3 Aug 09 to 2 Aug 10 and no evaluation was required per AFI 36-2406, *Officer and Enlisted Evaluations Systems*. Although the AFBCMR Directive dated 17 Dec 13 included providing the applicant with a new "Meets Standards" OPR, an OPR was not accomplished.

The applicant's records include an AF Form 77, certified true copy dated 12 Jan 15, for the period 3 Aug 10 through 31 Mar 14. It states there were no reports available for the period 3 Aug 10 through 31 Mar 14 and no report was required according to AFI 36-2406. The applicant was previously discharged during the period but was returned to file due to results of an AFBCMR.

On 2 Feb 16 (BC-2015-01688), the Board granted the applicant's request for award of an additional 10 paid IDT points for R/R year for each month starting 1 Apr 14 through 28 Feb 15 for satisfactory service (totaling 110 points). The Board noted the award of the points should be the final step in making the applicant's service records correct. The applicant's OPR for the period of 4 Aug 09 to 3 Aug 10 was removed from his records and replaced with an AF Form 77 by ARPC as an administrative correction.

On 25 Feb 16 (BC-2016-03297), the applicant requested further corrections of his records based on allegations of reprisal pursuant to 10 U.S.C. § 1034 and DODD 7050.06, *Military Whistleblower Protection*. On 9 and 29 Oct 18, the Board found there was no evidence the applicant was the victim of reprisal; however, there was evidence to find the applicant's supervisor had malice intent. Further, it was improper for the applicant, a lieutenant colonel, to be assigned a GS-12 rater. The Board recommended removal of his LOC dated 6 Aug 15 and he be awarded an additional 10 paid IDT points for each month from 1 Mar 15 to 15 Sep 15 (70 points total). The Board denied the applicant's request for removal of his mental health records and that he be provided a direct promotion to the rank of colonel. With respect to the applicant's request his feedback forms, UIF, revocation of telework agreement and security clearance be removed from his records, the Board noted these documents were not contained in his records and therefore there was no action for the Board.

On 2 Jun 17, the applicant was transferred to the Air Force Reserve Retired List, effective 31 Mar 17, eligible for retired pay except for attainment of eligibility age.

The applicant met a SSB for the CY12 Air Force Reserve Line and Nonline Colonel Selection Board in Jun 17, as directed by the AFBCMR, and was not selected for promotion.

In Jun 21, the applicant attained eligibility age for retired pay.

On 16 Mar 23, as remanded and ordered by the Court of Federal Claims (CoFC), the Board reconsidered the applicant's request (BC-2016-03927-2) he receive a direct promotion to the rank of colonel or in the alternative again be considered by a SSB for the CY12 Air Force Reserve

Colonel Line and Nonline Selection Board, his OSR be corrected with OPRs for the periods Aug 09 to Aug 10 and Feb 15 to Sep 15, the AF Form 77 for the period 3 Aug 09 to 2 Aug 10 be replaced with a "Meets Standards" OPR, he be awarded an MSM w/1 OLC for the period Aug 06 to Aug 09 and the Board provide an explanation for the gaps in his OPRs and that the missing awards were not due to his own fault for inclusion in his OSR. The Board denied the applicant's requests. The Board noted the applicant was already considered by an SSB for the CY12 Air Force Reserve Colonel Line and Nonline Selection Board and was not selected. Further, the Board was without authority to promote the applicant to the rank of colonel. With respect to the request for corrections of his OPR, the Board noted per AFI 36-2406, the AF Form 77 is used to document missing, lost, removed or voided evaluations and to justify gaps between evaluations. ARPC indicated they were unable to obtain a re-accomplished OPR and the Board had no legal authority to compel a current or former military member or civilian employee to endorse a performance report. The Board also noted while the applicant was previously awarded paid IDT points, the applicant did not perform duties and therefore there was no basis for granting OPRs for these periods. The Board also noted while the applicant contended he struggled for 15 years due to the false allegations he submitted fraudulent AF IMTs 40A, the applicant's chain of command was required to investigate any complaints of fraud in accordance with AFI 90-301. The Board concluded the past records corrections were more than considerable and sufficient to remedy any error or injustice.

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

On 25 Jul 23, the applicant filed an unopposed motion for remand of his case to the AFBCMR. The applicant contends the Air Force never completed the corrections to his records. His records contain a five year gap in OPRs that the AFBCMR failed to address and improperly denied him promotion to the rank of colonel. The ARPC Advisory opinion stated there was no viable way to accomplish the missing OPRs since the applicant was not performing military duties to document during this timeframe. However, the AFBCMR may reconsider its previous position given the applicant performed some military duties in 2009 to 2010. The Board can also reconsider its position for award of the MSM w/1 OLC. His OPR for the 2006 to 2009 timeframe reflected outstanding military service and promotion during that timeframe and there was evidence of a draft recommendation for award of the MSM w/1 OLC. The CoFC remanded the case to the AFBCMR previously. However, the applicant did not believe the Board's decision afforded a satisfactory basis for the disposition of his case. In an order filed 26 Jul 23, the CoFC remanded the applicant's case to the AFBCMR stating additional explanations of the Board's findings would likely produce a more expeditious conclusion of the applicant's claims.

The Remand Motion and the CoFC Court Order are at Exhibits T and U, respectively.

APPLICABLE AUTHORITY/GUIDANCE

10 U.S.C. § 14502(a)(1) In the case of an officer or former officer who the Secretary of the Military Department concerned determines was not considered for selection for promotion by a mandatory promotion board because of an administrative error, the Secretary concerned shall convene a SSB to determine whether such officer or former officer should be recommended for promotion.

AFI 36-2504, *Officer Promotion, Continuation, and Selective Early Removal in the Reserve of the Air Force*, Paragraph 11.2.1, The AFBCMR or a federal court can direct any officer for consideration by SSB. Paragraph 11.3, Conditions that may warrant an SSB, the board did not consider material information that should have been available in compliance with pertinent Air Force directives and polices.

AFI 36-2504, paragraph 2.8, Eligible Officer. Paragraph 2.8.1. Monitors their eligibility to ensure their OSR is correct and current before the convening of the selection board. Reviews their officer preselection brief (OPB) for accuracy of personnel data, any adverse information and takes necessary steps to correct errors. Paragraph 2.8.2. Considers submitting a letter to the board, if applicable. Paragraph 2.8.3. Reports any errors to the military personnel flight (MPF) or other point of contacted listed on the OPB instruction sheet.

AFI 36-2504, paragraph 11.7, Writing Letters to SSBs. The member is permitted to write to the SSB; however, in most cases, the letter may not contain any information or address any event occurring after the convening date of the original board. Any letter written to the original board will be included in the member's OSR unless otherwise deemed inappropriate or appropriately removed or replaced by the AFBCMR.

DAFI 36-2406, *Officer and Enlisted Evaluations Systems*, paragraph 5.2.4, Administrative LOEs are filed in a member's records to document missing, lost, removed or voided evaluations. Paragraph 4.2.4.2, Administrative LOEs are used to justify legitimate gaps between evaluations such as to document a break in service. Paragraph 5.2.4.3, Administrative LOES are used to substitute lost, missing or removed evaluations such as those ordered by the AFBCMR and lost and/or missing evaluations in which all actions to locate the documents have failed. Per paragraph 3.4, Air Force Reserve officers in a non-pay status do not require an OPR.

AFMAN 36-2806, *Military Awards; Criteria and Procedures*, paragraph 3.19, Recommendations (to include reconsiderations and upgrades) submitted after the applicable time limitation are only considered if submitted pursuant to 10 U.S.C. § 1130. This legislation allows consideration of recommendations submitted beyond the time limitation. Paragraph 3.19.1., Requests are made by someone other than the member, who has firsthand knowledge of the acts or achievements. Every effort should be made to obtain an endorsement from someone in the member's chain of command at the time of the act, achievement or service was performed. Paragraph 3.19.2., Procedure. The requester submits a written request to a member of Congress for endorsement on a recommendation, pursuant to 10 U.S.C. § 1130. Recommendations should include a narrative justification, citation, eyewitness statements and supporting documents. The member of Congress endorses the recommendation and submits it to the Air Force Legislative Liaison Office.

AIR FORCE EVALUATION

ARPC/DPTSP recommends the Board direct the applicant's previous or current leadership chain to sign a "Meets Standard" OPR for the period 3 Aug 09 through 2 Aug 10 as previously directed by the AFBCMR. ARPC does not have the authority to create and sign an OPR for a member that was never assigned to ARPC. ARPC/DPTS also recommends approval of an AF Form 77 for the period 3 Aug 10 through 20 Jan 12 that states the gap in his records is due to no fault of his own.

The complete advisory opinion is at Exhibit W.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 28 Aug 23 and to counsel on 6 Sep 23 for comment (Exhibit X). Counsel contends the advisory opinion did not address the Court's instruction to reconsider award of the MSM w/1 OLC. He provides a draft MSM w/1 OLC citation and emails to demonstrate the award was being processed at the time his difficulties with his command began.

ARPC states several different time periods for the OPR and AF Form 77 in question that seem to be typographical errors. To be clear the proper dates for the requested OPR are 4 Aug 09 to 3 Aug

10 and the proper dates for the requested AF Form 77 are 4 Aug 10 to 20 Jan 12. He provides a draft unsigned OPR for the period 3 Aug 09 to 2 Aug 10.

The advisory also did not address the CY12 SSB. The SSB must be able to consider a record that reflects his observed performance from Aug 09 to Aug 10, it must be told that the gap from Aug 10 to Jan 12 is through no fault of his own and that he was fittingly commended for his outstanding service between 2006 to 2009 with a grade appropriate award. He requests the decisional documentation include instructions to the Court he be provided an opportunity to review and propose edits to documents before the SSB and that he be permitted to submit a statement to the SSB.

The applicant's complete response is at Exhibit W.

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 concludes the applicant is the victim of an error or injustice. The Board concurs with the rationale and recommendation of ARPC/DPTSP and finds a preponderance of the evidence substantiates the applicant's contentions in part. Specifically, the applicant has provided sufficient evidence for a "Meets Standard" OPR for the period 3 Aug 09 to 2 Aug 10. While counsel contends there appears to be typographical errors in the ARPC advisory and the proper dates for the OPR are 4 Aug 09 to 3 Aug 10; the last completed OPR in the applicant's records reflects a close out date of 2 Aug 09. Further, the AF Form 77 currently in the applicant's records reflects the period 3 Aug 09 through 2 Aug 10 and the applicant provides a draft OPR for the period 3 Aug 09 to 2 Aug 10. The Board also recommends the applicant be provided an AF Form 77 for the period 3 Aug 10 to 20 Jan 12 stating evaluation reports were not rendered due to no fault of the applicant as requested. In view of this correction, the Board also recommends the AF Form 77 currently in his records for 3 Aug 10 through 31 Mar 14 be amended to show a from date of 21 Jan 12, instead of 3 Aug 10. Based on the aforementioned corrections of the applicant's evaluations, the Board recommends the applicant again be considered by a SSB for the CY12 Air Force Reserve Colonel Line and Nonline Selection Board. The applicant also requests he be provided the opportunity to review all documents that the SSB will consider and he be permitted to submit a supplemental statement to the SSB. In this respect, the Board notes AFI 36-2504 allows officers eligible to meet promotion boards to review their OSRs and OPBs for accuracy and write letters to promotion boards they are meeting. Accordingly, there is no need for the Board to correct the applicant's records to grant him approval to review his records which will be considered by the SSB or write a letter to the SSB. However, the Board finds the evidence presented did not demonstrate an error or injustice to permit the applicant to propose edits to his OSR to be reviewed by the SSB. The Board also finds insufficient evidence has been presented for award of the MSM w/1 OLC. While the applicant provides a draft citation and emails regarding the administrative processing and status of his award, there is no evidence the applicant was recommended by his rating chain or was approved by the approval authority for award of the MSM w/1 OLC. Moreover, the applicant has not provided any evidence he has pursued award of the MSM w/1 OLC per 10 U.S.C. § 1130 and AFMAN 36-2806. Therefore, the Board recommends correcting the applicant's records as indicated below.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show:

a. AF Form 707, *Officer Performance Report (Lt thru Col)*, for the reporting period 3 Aug 09 to 2 Aug 10, with a “Meets Standard” rating, be accomplished by his rating chain per his assignment at the time as an Admissions Liaison Officer for the United States Air Force Academy.

b. AF Form 77, *Letter of Evaluation*, be accomplished to reflect he was not rated for the period 3 Aug 10 to 20 Jan 12, due to no fault of his own.

c. AF Form 77 in his records for the reporting period 3 Aug 10 to 31 Mar 14 be amended to show a from date of 21 Jan 12, instead of 3 Aug 10.

d. Upon completion of the aforementioned corrections, he be considered by a SSB for the CY12 Air Force Reserve Colonel Line and Nonline Selection Board

However, regarding the remainder of the applicant’s request, the Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the application will only be reconsidered upon receipt of relevant evidence not already considered by the Board.

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-2016-03927-3 in Executive Session on 3 Oct 23 and 16 Oct 23:

- , Panel Chair
- , Panel Member
- , Panel Member

All members voted to correct the record. The panel considered the following:

- Exhibit S: Record of Proceedings, w/ Exhibits A-R, dated 23 Mar 23.
- Exhibit T: Motion for AFBCMR Remand, filed 25 Jul 23.
- Exhibit U: CoFC Remand Order, filed 26 Jul 23.
- Exhibit V: Documentary evidence, including relevant excerpts from official records.
- Exhibit W: Advisory Opinion, ARPC/DPTS, dated 18 Aug 23.
- Exhibit X: Notification of Advisory, SAF/MRBC to Applicant, dated 28 Aug 23.
- Exhibit W: Applicant’s Response, w/atchs, dated undated.