

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2018-01171

XXXXXXXXXX

COUNSEL: XXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His date of rank (DOR) for second lieutenant (O-1) be corrected to reflect 29 May 13 versus 2 Aug 13.
2. His subsequent DOR for first lieutenant (O-2) and captain (O-3) be adjusted to reflect 29 May 15 and 29 May 17, respectively.
3. His pay record be corrected to reflect the changes to his dates of rank and he receive retroactive pay and allowances based on these correction.

APPLICANT'S CONTENTIONS

In Mar 13, the applicant was a Cadet First Class at the United States Air Force Academy (USAFA) and was a suspect in a Security Forces investigation for allegedly stealing \$620 from his roommate, despite the fact that he himself also had a ring stolen from his dormitory locker. Because he was undergoing this investigation, he was not allowed to graduate with his class. Approximately two months later the applicant was cleared of all charges and on 2 Aug 13, he was finally allowed to graduate. Due to this injustice of being wrongfully accused, he was deprived of the opportunity to graduate with his classmates and his promotion to second lieutenant was delayed.

In support of his appeal, the applicant provides a letter from his legal counsel with 13 attachments, which include: the Office of Special Investigation Report of Investigation that was closed without action; documents from his military personnel record that show his successful career as an officer; a memorandum of support from his current commander who recommends that his dates of rank be corrected; and a memorandum from USAFA/JA that confirms the applicant was cleared of all charges and would have no objection if the Board were to adjust the applicant's dates of rank.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a Regular Air Force captain.

On 1 Apr 13, a Security Forces Report of Investigation, provided by the applicant shows he was subject in an investigation in violation of Article 121, *Larceny and Wrongful Appropriation*, Uniform Code of Military Justice.

On 23 Oct 18, a memorandum from USAFA/JA, provided by the applicant, indicates due to the investigation, the applicant was not allowed to graduate on time. The investigation eventually revealed there was no evidence of wrongdoing, and he was cleared of all charges. As a result, the applicant was allowed to graduate, albeit several months after his peers. In addition, the memorandum states “if [Applicant’s] commander and/or the Air Force Board for Correction of Military Records believes that equity and fairness demand that [Applicant’s] DOR be adjusted to reflect the same date of graduation/commissioning date as his USAFA peers, they have no objection based on their review of the evidence.”

According to the applicant’s *Report on Individual Personnel* summary, he was promoted to second lieutenant on 2 Aug 13, to first lieutenant on 2 Aug 15, and captain on 2 Aug 17.

For more information, see the excerpt of the applicant’s record at Exhibit B.

APPLICABLE AUTHORITY/GUIDANCE

AFI 36-2501, Officer Promotions and Selective Continuation

A2.1. Eligibility for Promotion to first lieutenant. Second lieutenants on the ADL [active duty list] are eligible for promotion as soon as they have 24-months time-in-grade computed from their Current Grade Date of Rank (CGDOR) as a second lieutenant.

A2.2. Eligibility for Promotion to captain. Promote IPZ [in the promotion zone] first lieutenants on the ADL selected for promotion to captain after completing 24-months time-in-grade computed from their CGDOR as a first lieutenant, or upon the Principal Deputy Under Secretary of Defense for Personnel and Readiness (PDUSD(P&R)) approval of the captain selection board report, whichever is later. The Secretary of the Air Force may authorize DOR/effective date adjustment when there are unusual circumstances that cause unintended delays in the processing or approval of a selection list (i.e., delay of management level decisions, constructive service credit for officers overdue who due to processing delays, will not be promoted on-time) according to DoDI 1310.1, *Rank and Seniority of Commissioned Officers*, paragraph 4.9; however, the new DOR cannot be earlier than the quarterly cycle close-out date (i.e., 31 Mar, 30 Jun, 30 Sep or 31 Dec for each year).

Title 10, United States Code, Section 531 (10 U.S.C. § 531): Original appointments of commissioned officers.

Original appointments in the ranks of second lieutenant , first lieutenant , and captain in the Regular Army, Regular Air Force, and Regular Marine Corps and in the grades of ensign, lieutenant (junior grade), and lieutenant in the Regular Navy shall be made by the President alone.

According to Under Secretary of Defense (Personnel and Readiness) memorandum dated 10 Feb 15, only the President may appoint Regular officers above the grade of captain and Reserve officers above the grade of lieutenant colonel (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.

SAF/GCM Memorandum with Subject, *AFBCMR Authority to Adjust Date of Rank*, dated 12 Mar 08.

The Secretary concerned may adjust the date of rank of an officer if the appointment of that officer to that grade is delayed from the date on which (as determined by the Secretary) it would otherwise have been made by reason of unusual circumstances (as determined by the Secretary) that caused an unintended delay in the processing or approval of the report of the selection board or the processing or approval of the promotion list established on the basis of that report. Therefore, if the AFBCMR determines that the appointment of an applicant was delayed by reason of unusual circumstances, the AFBCMR may adjust the applicant's DOR to the date it would otherwise have been made had the unusual circumstances not occurred.

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 notes the applicant provided a letter of support from his commander and a memorandum from USAFA/JA that confirms there was no evidence of wrongdoing. However, as a result of the investigation, the applicant's graduation and subsequent promotion to second lieutenant were delayed. Given that the applicant was cleared of all charges and would have otherwise been promoted to second lieutenant on 29 May 13, the Board finds the preponderance of the evidence supports his claim. The Board also recognizes the authority to change the date of appointment lies solely with the Secretary of Defense; however, pursuant to the board's statutory authority under 10 U.S.C. § 1552 to correct errors and injustices, the Board does have the authority to change his date of rank for second lieutenant even though it predates the date of his commission. Furthermore, the Board recommends backdating his dates of rank to first lieutenant and captain, as they were subsequently delayed because of the same injustice. Therefore, the Board recommends correcting the applicant's records as indicated below.
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 pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show that:

- a. His date of rank to the grade of O-1 is 29 May 13, rather than 2 Aug 13.
- b. His date of rank to the grade of O-2 is 29 May 15, rather than 2 Aug 15.
- c. His date of rank to the grade of O-3 is 29 May 17, rather than 2 Aug 17.
- d. He receive retroactive pay and allowances based on the corrections to his dates of rank.

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-2018-01171 in Executive Session on 26 Oct 2021:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 25 Nov 20.

Exhibit B: 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.