

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2019-05103

XXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NOT INDICATED

APPLICANT'S REQUEST

Her military records be corrected to reflect a date of rank (DOR) to the grade of colonel (O-6) to read 2 May 17, and her military pay, retirement records, and retirement pay be corrected accordingly.

Additionally, request the Air Force Reserve (AFR) policy be re-written to ensure all injured/ill airmen whose physical disability does not interfere with their ability to perform their duties be promoted as of their original DOR and in their original position on the Reserve Active Status List (RASL), rather than after discharge under Title 10, United States Code, 1372(3) (10 USC 1372). **(Outside the Board's authority to adjudicate; request not in compliance with Department Air Force Instruction (DAFI) 36-2603, Air Force Board for Correction of Military Records (AFBCMR))**

APPLICANT'S CONTENTIONS

Between Oct 16 and 29 Aug 18 (retirement), she was provided with three reasons for her inability to promote: 1) she was on medical hold and her promotion was being involuntarily delayed; 2) she was assigned to a lieutenant colonel (O-5) billet and because she was on medical hold she could not be reassigned to a colonel (O-6) billet; and 3) she could be released from active duty and the O-5 billet to which she was assigned, but could not then return to active duty in an O-6 billet because she was on medical hold.

When she was first notified of her selection, it was not mentioned whether or how her disability evaluation status would affect her ability to promote. Instead, she was informed, "AGRs are subject to grade limitations set in Title 10, U.S.C., section 12011 (sic) and have their promotions involuntarily delayed until they complete the AGR tour or are moved into an O-6 position." She was on a section 10211 tour, but her assignments point of contact (POC) told her there was no headspace or strength limitations that affected her; there were several O-6 billets to which she could be assigned, and he was eager to reassign her as soon as possible.

She was then told her promotion was being involuntarily delayed because she was an AGR. Her assignments POC attempted to resolve this issue but explained he could not move her to an O-6 billet and his hands were tied with regard to formal assignment action.

On 2 May 17, her email address changed to reflect colonel and her dependents' identification cards reflected her grade as colonel, but she never received a written explanation for her promotion delay. She retired from the AFR wearing the grade of lieutenant colonel (O-5) and her promotion to colonel became effective upon her retirement.

The first reason for involuntary delay is not supported by the applicable AFI. The second reason of "no reassignments" is based on well-founded policy of avoiding interruption in medical treatment and delays in disability processing; however, her promotion to colonel would not have created a disruption. The third argument of "no new orders" is also based on well-founded policy of not issuing orders to ill or injured airmen who may not be able to perform their job.

Her medical condition did not interfere with her ability to do her job, and the Air Force admitted as much.

During the period in question, only two involuntary promotion delays were authorized by AFI 36-2504, *Officer Promotion, Continuation and Selective Early Removal in the Reserve of the Air Force*. Section 6.7.1.2. explained that AGR colonel selects may be involuntarily delayed in pin on due to strength limitation of the AGR force imposed by law. This was not a problem in her case as there was plenty of room in strength limitations for her promotion. Other authorized reasons for delay did not apply to her.

Moreover, AFI 36-2504 is clear that due process must be afforded to the officer whose promotion is being delayed. She was not afforded any of these due process protections. She was informally notified of the three reasons for her delay, and none were made official or explained in writing. She was never given a decision that she could appeal. Her leadership advocated for her, but she does not think the ultimate decision complied with Air Force regulation or law.

At the time of her entry into the disability evaluation system, she occupied an AGR billet under 10 USC 10211. AFI 36-2504 states, "[t]he grade of the position determines whether a selected officer can accept the promotion at DOR. If the grade of the position does not support the higher grade, the DOR is delayed until the officer obtains a position to support the higher grade, or the officer completes the tour." Once notified of her promotion selection, the assignments POC found several O-6 billets to which she could be assigned, some of which were HQ AGR positions. The change would have been made on paper only and easy to accomplish. Unfortunately, she was not allowed to be reassigned as during this time airmen going through the disability process were not to be reassigned except for emergency reasons. None of the limiting circumstances associated with reassignment applied to her because it would be a paper change only, and her medical condition did not prevent her from performing her assigned duties.

During this period, she was routinely moved to new offices to utilize her skills in O-6 roles. The AFR had significant flexibility in where and how to assign her. The applicant provided multiple examples of her roles and awards/recognition received in support of her contention that her performance of assigned duties was not disrupted due to her medical condition.

Additionally, it had been suggested to her that she could have voluntarily terminated her active duty orders to allow for promotion, with her DOR and position on the RASL remaining the same. However, this would have resulted in a Permanent Change of Station which would have interfered with her medical care and disability processing. Further, once released from active duty orders, she would not be allowed back on orders until her disability processing was completed. Finally, she was never offered the opportunity to separate, reassign, and come back on active duty orders. Generally, the policies relating to airmen undergoing disability processing are reasonable but should not be applied indiscriminately without considering the particular case at issue.

Finally, while some argued 10 USC 1372(3) remedies situations like this, she disagreed. Section 1372(3) applies to airmen whose physical disability caused the promotion delay. As explained at length, her inability to promote was not caused by her physical disability. The Air Force conclusively determined her physical disability did not interfere with her ability to perform her duties. Neither did she retire prior to the date she would have promoted, 2 May 17. She retired later, on 28 Aug 18 (sic). The AFR refusal to waiver the default provisions of disability processing and refusal to allow a "paper reassignment" to an O-6 billet is the reason she did not promote. It is important to read 10 USC 1372(3) in context. It is not the only provision available to airmen going through the disability review process.

Based on all of the above, she believes an error, or an injustice, occurred when the AFR delayed her promotion to colonel until after she retired.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired AFR colonel receiving retired pay.

On 14 Jul 11, according to Special Order XXXXX, dated 28 Mar 11, the applicant was ordered to extended active duty (voluntary) per Title 10, United States Code, 12301(d) (10 USC 12301(d)), in the Active Guard and Reserve (AGR) program.

On 1 May 17, according to documentation provided by the applicant, her nomination for promotion to colonel received Senate confirmation.

According to HQ ARPC/PBE memorandum, Air Force Reserve Line and Nonline Colonel Selection, undated, provided by the applicant, she was notified of her selection to the grade of colonel and provided guidance regarding promotion requirements.

On 28 Aug 18, the applicant was furnished an honorable discharge, in the grade of lieutenant colonel (O-5), with Narrative Reason for Separation: Disability, Permanent IDES, and credited with 13 years, 4 months, and 1 day active duty service.

On 29 Aug 18, according to Special Order No. XXXXX, dated 8 May 18, the applicant was permanently disability retired in the grade of colonel, per AFI 36-3212 and 10 USC 1372, with a reserve grade of lieutenant colonel (O-5), and a compensable percentage for physical disability of 40 percent.

On 27 Jul 20, a DD Form 215, *Correction to DD Form 214, Certificate of Release or Discharge from Active Duty*, was published correcting Blocks 4a., 4b., and 12i, to reflect Col, O6, and 2017 May 02, respectively.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisory at Exhibit C.

APPLICABLE AUTHORITY/GUIDANCE

10 U.S. Code § 10211 - *Policies and regulations*: participation of Reserve officers in preparation and administration - Within such numbers and in such grades and assignments as the Secretary concerned may prescribe, each armed force shall have officers of its reserve components on active duty (other than for training) at the seat of government, and at headquarters responsible for reserve affairs, to participate in preparing and administering the policies and regulations affecting those reserve components. While so serving, such an officer is an additional number of any staff with which he is serving.

10 U.S. Code § 1372 - *Grade on retirement for physical disability: members of armed forces*

(3) The permanent regular or reserve grade to which he would have been promoted had it not been for the physical disability for which he is retired and which was found to exist as a result of a physical examination.

Air Force Instruction (AFI) 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*, dated 2 Feb 06:

5.15. *Grade on Retirement.* Unless entitled to a higher retired grade under some other provision of law, members permanently retired for disability or placed on the TDRL retire in the highest of the following grades (10 U.S.C. 1372):

5.15.4. Members who are retired on or after 23 Sep 96, may be retired in the regular or reserve grade to which they had been selected and would have been promoted, had it not been for the physical disability for which they were retired. (10 U.S.C. 1372 was amended effective 23 Sep 96.)

AFI 36-2132, Volume 2, *Active Guard/Reserve (AGR) Program*, dated 20 Mar 12

2.10. *Controlled Grades.* AGRs are managed within the congressionally mandated end-strength authorizations for senior master sergeant, chief master sergeant, major, lieutenant colonel, and colonel. Assignment or promotion to these controlled grades cannot exceed the annually established military duty end-strength or grade ceilings. Reserve FSMs, AFRC/A1K and AFRCRS must obtain control grade ceiling clearance from AFRC/A1A prior to requesting promotion authorization from the promotion authority.

3.12. *Promotions.* While serving in AGR status, existing AFR promotion policies with the exceptions listed below will apply to both officer and enlisted personnel. The grades of senior master sergeant, chief master sergeant, major, lieutenant colonel, and colonel are Congressionally controlled. Promotion to these controlled grades cannot exceed the annually established military duty end-strength or grade ceilings.

3.12.1. Officer AGRs selected for promotion must be the sole occupant of a higher-grade UMD position prior to assuming the new grade while serving in AGR status. By law, officers not occupying a higher-grade position, or constrained by controlled grade limitation may not assume the new grade.

3.12.1.1. Under these circumstances the promotion is considered involuntarily delayed IAW 10 U.S.C., § 14311. If the controlled grade limitation is lifted, or the officer obtains a position equal to the higher grade, the officer may assume the higher grade.

3.12.1.2. Promotions for officers will automatically be delayed until the member occupies a higher grade position or the member leaves the AGR program (AFI 36-2504, Officer Promotion, Continuation and Selective Early Removal in the Reserve of the Air Force). Reserve unit FSMs and AFRC/A1K must coordinate officer promotion eligibility and grade ceiling clearance with AFRC/A1A (AFRC/A1L for colonel) prior to requesting promotion authorization from ARPC. An AGR promotion letter requesting accelerated promotion will be accomplished on an officer selected for promotion to the next higher grade and being reassigned to an AGR position of the next higher grade. The letter will be accomplished by the gaining commander or director requesting a promotion effective date to coincide with the date of assignment to the AGR position. The officer's reassignment and promotion dates will be the same.

AFI 36-2504, *Officer Promotion, Continuation and Selective Early Removal in the Reserve of the Air Force*, dated 9 Jan 03:

Chapter 6 – *Promotion Special Issues*

6.6. *Promotion Procedures for USAFR AGRs.* All HQ AGR officers selected for promotion to the grade of colonel and below must obtain approval from AF/RE before the officer can assume the higher grade. For AGRs assigned to HQ AFRC, HQ AFRC/DPM (for lieutenant colonel selects and below), and HQ AFRC/DPO (for colonel selects) will send the request for the officer to assume the higher grade to HQ USAF/REAMO for processing to HQ USAF/RE. For other headquarters assigned AGRs, USAF/REAMO will prepare the request and process it to HQ USAF/RE for approval. HQ AFRC/DPM will prepare the request for all other officer AGRs, and

send it to AFRC/CV for approval. The memo will include a recommendation for promotion, position control number, PAS code, and authorized grade for the position to which assigned.

Chapter 8 – *Voluntary Delay and Declination of Promotion*

8.7. *Delay for Limitations in Officer Strength In Grade (AGR)*. Promotion of an officer on the RASL, serving on active duty, to a grade with strength limitations set by Title 10 U.S.C., Section 10211 and 12310, can be delayed to ensure compliance with those strength limitations. The delay expires when the strength-in-grade limitations no longer apply. The grade of the position determines whether a selected officer can accept the promotion at DOR. If the grade of the position does not support the higher grade, the DOR is delayed until the officer obtains a position to support the higher grade, or the officer completes the tour. If the officer wants to decline the promotion, the commander submits the original AF Form 3988 to HQ ARPC/DPJ (for inclusion in the Master Personnel Record) through HQ USAF/REPS and HQ AFRC/DP.

8.7.1. When the promotion becomes effective, the DOR and position on the RASL of these officers remains the same, as if there had not been a delay.

8.7.2. An officer with a delayed promotion under this paragraph may request release from active duty. If granted, when the promotion becomes effective, the DOR and position on the RASL of these officers remains same, as if there had not been a delay.

AFI 36-2110, *Assignments*, dated 23 Jun 16:

Table 2.1., *Assignment Availability Codes*., Rule 26., Code 37 – Medical Evaluation Board (MEB) or Physical Evaluation Board (PEB); Member deferred from PCS reassignment pending results of MEB or PEB; Deferment Period or Effective Date – Regardless of date of availability on AF Form 469, Duty Limiting Condition Report, no assignment action should be taken until Airman is returned to duty through AFPC/DPAMM and code 37 is removed by the MTF as Airman may be unfit for retention.

AIR FORCE EVALUATION

AF/REG recommends denying the application. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice. The applicant was not promoted to colonel because she was not assigned to an authorized O-6 billet. It is standard practice to delay promotions for lieutenant colonels (O-5) in O-5 AGR billets until they are assigned to a valid O-6 billet.

The applicant was never assigned to the AF/REG Colonels Group portfolio. Although she was selected for promotion in 2016, she was in an O-5 AGR billet. Per AFR policy, a lieutenant colonel in an O-5 billet will have their promotion automatically delayed until they occupy an O-6 billet.

The applicant was a JA [legal] officer and JA is a centrally managed career field, meaning their O-6 billets are not filled by the standard REG process. REG has no record the JA community requested a reassignment action into an O-6 billet, nor was the applicant ever reassigned into an O-6 billet while serving. At the time of the applicant's selection for promotion, there were only two JA O-6 billets, and both were encumbered. There were no vacant JA O-6 AGR billets in which to move her. There were approximately 10 vacant part-time Individual Mobilization Augmentee (IMA) O-6 billets available at that time, but there was no request to reassign the applicant into one of them. Additionally, there is no record showing the applicant applied for any other O-6 vacancy advertised through the REG office.

The complete advisory opinion is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 1 Sep 22 for comment (Exhibit D) but has received no response.

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 not the victim of an error or injustice. The Board concurs with the rationale and recommendation of AF/REG and finds a preponderance of the evidence does not substantiate the applicant's contentions. 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 Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.5, considered Docket Number BC-2019-05103 in Executive Session on 21 Dec 22:

, Panel Chair
, Panel Member
, Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 16 Aug 21.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AF/REG, w/atchs, dated 10 Jun 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 1 Sep 22.

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

X

Board Operations Manager, AFBCMR