

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02564

XXXXXXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His military record be corrected to reflect the following:

1. His grade as lieutenant colonel (O-5); or as an alternative, authorize Special Selection Board (SSB) consideration.
2. Remove the *Commander's Impact Statement (CIS)*, dated 4 Aug 18.
3. Amend his AF Form 707, *Officer Performance Report (OPR) (Lt thru Col)*, Section V, *Additional Rater Overall Assessment*, to remove the statement "Limited office presence shifted lion's share of duties/responsibilities to fellow IG members—has reached his plateau!" (Fourth Bullet).

APPLICANT'S CONTENTIONS

Counsel, on behalf of the applicant, contended the applicant enlisted in the Air National Guard (ANG) on 22 Sep 87 and served his country honorably for 16 years, separating on 14 Dec 02 at the grade of master sergeant (E-7). He reenlisted and received his commission as a second lieutenant (O-1) on 18 Apr 03, achieving the grade of major (O-4) on 3 Jan 12. In addition, for roughly 24 years, the applicant was employed as a dual status technician while with the ANG.

The applicant's service record is impeccable as evidence by numerous exemplary performance reviews. He reported receiving hazardous duty pay on eight different occasions during tours in Rwanda, Haiti, Mogadishu (based out of Cairo), Germany, United Arab Emirates, and Afghanistan. During his deployments, he experienced the trauma classifications of incoming fire, sniper/sapper, ambush/attack, firefight, wounded/injured, and exposure to the death of others. The applicant experienced 18 IDF hits within 100 meters of his residence and the force of the blast knocked him out of his rack. In addition, he was in a helicopter that received incoming fire that injured the pilot.

During his most recent deployment to Afghanistan, the applicant and his unit came under rocket and small arms fire in which four of his men were injured. The applicant applied aid to the wounded, specifically recalling one of the wounded being 19 or 20 years old with a serious injury to one of his legs.

Upon returning from deployment, the applicant felt different and has been experiencing depression symptoms since 2015. In Feb 16, he was diagnosed with Major Depressive Disorder (MDD) and Post-Traumatic Stress Disorder (PTSD). In addition, the applicant survived two suicide attempts by overdose in 2016. It was during this time he suffered from opioid dependence stemming from chronic pain, which was directly related to injuries sustained during military service. He has been opioid-free since Jan 17. On 7 Jul 17, his PTSD was determined to be "in the line of duty (ILOD)."

On 10 Mar 17, the applicant was evaluated for promotion and his commander's overall recommendation was "do not promote this board" for a reason of "member has not demonstrated potential for increased rank and responsibility." In addition, his Vice Commander also wrote a recommendation in which he recommended "definitely promote." Again, he was passed over for promotion on 6 Mar 18, for the same commander's single line reason of "member does not meet military standards at this time." In 2016, he filed a whistleblower complaint with the Department of the Air Force which he believes played a part in not being promoted.

During the time from 2015 through his permanent retirement, his mental state steadily declined. He continually sought treatment for his PTSD including being admitted to a behavioral health facility for four days in Jul 16, and also sought care from a Department of Veterans Administration (DVA) Medical Center. On 14 Apr 17, he was again diagnosed with MDD and PTSD, with his provider adding, "lack of support at his workplace is having a dramatic effect on him." From 30 May 17 – 16 Mar 18, he was again diagnosed with chronic MDD and PTSD, noting that "overly stressful environments could create a situation where the applicant's functioning could deteriorate."

On 23 Mar 18, the Invisible Wounds Interim Medical Review panel concluded in a summary of finding that the available records did not support the applicant's PTSD; however, there is clear evidence to the contrary. On 1 Aug 18, the applicant was accepted into the Air Force Wounded Warrior Program, effective 31 May 18. On 6 Jun 18, he was issued a duty limiting condition report to undergo evaluation by a Medical Evaluation Board (MEB) to determine his medical fitness for continued duty and retention. On 27 Jun 18, the MEB concluded he suffered from chronic PTSD, MDD, and Borderline Personality Disorder. In addition, the MEB stated he should not be exposed to stressful situations and his function was not compatible with the rigors of military service. In the CIS, dated 4 Aug 18, the applicant's commander wrote the applicant's medical condition originated Nov 12 – Jul 13 in Afghanistan, where he experienced events causing PTSD. He further added his recommendation of "do not retain." On 22 Oct 18, the applicant was declared 70 percent disabled due to combat-related PTSD, and on 11 Dec 19, he was declared 100 percent disabled due to combat-related PTSD.

His chain of command made a material error of discretion when they elected not to promote him because they failed to recognize the obvious signs of a combat veteran suffering from behavioral health issues. His 32 years of distinguished military service combined with 24 years of dual status technician employment against the commander's wrong and possibly prejudicial reasons not to promote is clear evidence of material injustice.

In Mar 17, in response to his deteriorating mental state to the point of suicidal ideation, the Department of Defense Inspector General (DoD-IG) sent a message to his leadership exposing a whistleblower complaint filed by the applicant. This action led to the applicant being fired after 24 years of civil service. His promotion recommendation, also completed in Mar 17, recommended "do not promote this board."

In accordance with Air Force Instruction (AFI) 36-2406, *Officer and Enlisted Evaluation Systems*, a "Do Not Promote This Board" recommendation requires the senior rater to provide comments explaining why the officer should or should not be promoted. The 10 Mar 17, the commander's promotion recommendation does not provide guidance or reasoning other than "no demonstrated potential." The applicant's Vice Commander commented on the same promotion board recommending promotion and noted the applicant's accomplishments and qualities. The fact that the two recommendations are so different without explanation demonstrates an error and injustice.

Furthermore, on the applicant's 2017 AF Form 707, the rater stated he was "...a seasoned officer whose talents have not been fully realized...continue to challenge with opportunities to

succeed.” On the same OPR, the commander wrote the applicant’s “limited office presence shifted the lion’s share of duties/responsibilities to fellow IG members--has reached his plateau.” It is important to note the applicant declined to sign it. Additionally, the lack of the applicant’s presence was due to his PTSD and medical appointments through DVA programs, factors his commander should have recognized. There is substantial evidence the applicant’s commander was not concerned with his PTSD. If the commander supported the applicant in obtaining the medical attention he so desperately needed, it is reasonably foreseeable his promotion and military career would have turned out significantly different. In weighing material injustice, the test is one of balance. The applicant’s case balanced against how his commander perceived him as a disgruntled airman and not a combat veteran struggling with PTSD. The balance is clearly in the applicant’s favor.

In addition, the *Commander’s Impact Statement for the Medical Evaluation Board* states, “routine administrative tasks take much longer than they should, and the supervisor has had to make schedule adjustments to allow the member to work.” The commander added the applicant “lacks mental focus, and when he encounters normal job stress, [the applicant] requires two to three days off to recover.” There are also comments regarding attendance at medical appointments under the civilian technician Employee Assistance Program (EAP). Participation in the program is to be held in strict confidence and records related to treatment are never placed in an employee’s file without permission. The applicant rebutted that in Jun 16, he provided the commander documents, notes, and reports identifying the decline in his mental state. The decline coincided with the applicant’s assignment to the IG office, and he begged for reassignment. The applicant further added the commander failed in his duty to provide a healthy work environment even having all this information. The applicant believes the whistleblower complaint he filed in 2016, which his command became aware of, led to reprisal, making his life miserable.

The applicant requests the Board assign him the earned grade of lieutenant colonel (O-5), or if not within their power to award, then authorize a Special Selection Board based on material unfairness. Additionally, in accordance with AFI 34-1101, *Warrior and Survivor Care*, the applicant received the reporting identifier 92W2 (Combat Wounded Warrior with Exemption). The applicant falls under the exception of personnel policies such as those normally required for promotion. This means despite his being passed over for promotion, he would still be eligible due to his very serious combat related injuries.

The applicant’s complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a permanent disability retired ANG major (O-4), with a compensable percentage of 100 percent for physical disability.

On 8 Dec 15, the applicant filed a reprisal complaint with DoD-IG, which upon investigation was found to be unsubstantiated.

On 10 Mar 17, according to AF Form 709, *Promotion Recommendation*, provided by the applicant, his commander marked Block IX, *Overall Recommendation*, “Do Not Promote This Board.”

On 6 Mar 18, according to AF Form 709, provided by the applicant, his commander marked Block IX, *Overall Recommendation*, “Do Not Promote This Board.”

On 19 Apr 18, according to AF Form 707, the applicant was rendered an evaluation for the period 10 Jan 17 – 30 Aug 17 and declined to sign acknowledgment of receipt.

On 4 Aug 18, according to documentation provided by the applicant, a *Commander's Impact Statement for Medical Evaluation Board* was submitted to the applicant's Informal Physical Evaluation Board.

On 22 Oct 18, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*, provided by the applicant, he was found to be unfit because of physical disability, with Unfitting Condition: Post-Traumatic Stress Disorder (PTSD) with Major Depressive Disorder and was recommended for temporary retirement with a combined compensable percentage of 70 percent.

On 27 Nov 18, according to Special Order Number XXXXX, dated 31 Oct 18, the applicant was relieved from active duty, organization, and station of assignment. Effective 28 Nov 18, he was placed on the Temporary Disability Retired List (TDRL) in the grade of major (O-4) with compensable percentage for physical disability of 70 percent.

On 11 Dec 19, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*, provided by the applicant, he was diagnosed with Unfitting Condition: Post-Traumatic Stress Disorder (PTSD) with Major Depressive Disorder, and was recommended for transfer from TDRL to permanent retirement with a combined compensable percentage of 100 percent.

On 4 Mar 20, according to Special Order Number XXXXX, dated 13 Feb 20, the applicant was removed from the TDRL and retired in the grade of major (O-4) with a compensable percentage of 100 percent for physical disability.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisories at Exhibits C, D, G, and J.

APPLICABLE AUTHORITY/GUIDANCE

AFI 36-2406, *Officer and Enlisted Evaluation Systems*, dated 8 Nov 16:

1.12. *General Prohibited Evaluator Considerations and Comments.* Certain items are prohibited for consideration in the performance evaluation process and will not be commented upon on any OES/EES form. Except as authorized in this instruction, do not consider, refer to, or include comments regarding:

1.12.1. *Sensitive Information.*

1.12.1.7. Medical Information. Only authorized medical officials are in a position to make comments on medical conditions. Evaluators must focus evaluation comments on the *behavior* and *duty performance* of the individual. Comments pertaining to the medical condition, treatment, or diagnosis are prohibited.

8.2. AF Form 709 (for Reserve Active Status List officers).

8.2.1. Reserve of the Air Force. Use AF Form 709 for promotion to lieutenant colonel and colonel. Refer to paragraph 8.6. for recommending colonels for promotion to the grade of brigadier general. AFR will use AF Form 709 for Position Vacancy promotion nomination to all grades. HQ ARPC/PB will issue instructions specific to each board.

8.2.1.4. A "Do Not Promote This Board" ("DNP") recommendation: The strength of the ratee's performance and performance-based potential does not warrant promotion by the CSB for which the officer is eligible. A senior rater must make comments explaining to the CSB why the officer should not be promoted.

Table 8.1. Instructions for Completing AF Form 709, Promotion Recommendation Form.

Line 12, Section IV, Item – Promotion Recommendation, Instructions: “Explain why the officer should or should not be promoted. This section covers the entire record of performance and provides key performance factors from the officer's entire career, not just recent performance...”

AFI 34-1101, *Warrior and Survivor Care*, Chapter 8, *Reporting Identifiers*:

8.1. Combat-Related Reporting Identifiers. The Air Force has developed a set of specific personnel policies for those Airmen who suffer a serious combat-related injury or illness. In order to identify Airmen eligible for these policies, the Air Force Wounded Warrior program created unique reporting identifiers that are updated in the Airman's personnel record. These reporting identifiers are:

8.1.2. Reporting Identifier 9W200 (enlisted)/92W2 (officers) – Combat Wounded Warrior with Exemptions. This reporting identifier provides exceptions to some personnel policies (e.g., promotion, evaluation, assignment, and professional military education exemptions, etc.) for Airmen who sustained very serious combat-related injuries, severely disabling illnesses, or loss of cognitive abilities. The reporting identifier does not confer any other combat-related benefit or entitlement.

AIR FORCE EVALUATION

NGB/AIPO provided an advisory for information only as the applicant's requests are outside their purview. The applicant should have requested a promotion board council review from the Air Reserve Personnel Center (ARPC) to inquire why he was not selected for promotion. A commander adding “definitely promote” does not determine promotion for an officer.

The complete advisory opinion is at Exhibit C.

ARPC/DPTS recommends denying the applicant's request to amend his AF Form 707. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice. In accordance with Department of the Air Force Instruction (DAFI) 36-2406, Attachment 2, *Appeal Guidance for Applicants*, A2.5.1. *Impact on Promotion or Career Opportunity*, “An evaluation is not erroneous or unfair because the applicant believes it contributed to a nonselection for promotion or may impact future promotion or career opportunities.”

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 7 Jul 22 for comment (Exhibit E), and the applicant replied on 5 Aug 22. In his response, counsel, on behalf of the applicant contended the first advisory by NGB/AIPO was unacceptable because they do not conduct SSBs or have authority to make action for promotion without the officer meeting an approved promotion scroll by the Secretary of Defense. The advisory states absent the approved promotion scroll, they must recommend denial. Therefore, the advisory can be completely disregarded. Rather than evaluating the merits of the applicant's request, the advisory states NGB/AIPO cannot provide any meaningful input into this request for additional insight. The advisory fails to address the applicant's PTSD or how his command disregarded this condition as a mitigating circumstance of his perceived deficient performance. The advisory also fails to address the differing opinions regarding the applicant's potential for continued service and worthiness for promotion. As the advisory provides no rationale for their recommendation, it can be essentially ignored.

The second advisory from ARPC/DPTS recommends denial stating a lack of evidence of an error or injustice, and references DAFI 36-2406, paragraph A2.5.1. The advisory entirely disregarded

the arguments presented in the applicant's legal brief, which clearly and convincingly establish the applicant's OPR is both improper and unjust because the rating chain failed to consider his PTSD as a mitigating factor. Furthermore, the applicant's 2017 OPR rater's comments conflict with the commander's comments, demonstrating the commander's bias against the applicant. The commander should have recognized the lack of the applicant's presence was due to his PTSD and medical appointments. Instead, the commander chose to see the applicant as a whistleblower and disgruntled airman, an opinion not supported by others in the applicant's command. The commander did not provide positive support or the required feedback on the applicant's promotion recommendation. If the commander had supported the applicant in obtaining the medical attention he so desperately needed, it is reasonably foreseeable the applicant's promotion and military career would have turned out significantly different.

In this instance, the advisory failed to address any of the arguments presented in the applicant's legal brief and opted instead to cite the AFI. The recommendation is puzzling as it does [not] provide any explanation why the applicant's contentions are insufficient to warrant relief.

The applicant's complete response is at Exhibit F.

AIR FORCE EVALUATION

AFPC/DPFDD recommends denying the applicant's request to remove the Commander's Impact Statement (CIS) for the Medical Evaluation Board from his records. Based on the documentation provided by the applicant and analysis of the facts, there is no indication an error or injustice occurred at the time the Physical Evaluation Board (PEB) processed his disability case.

In accordance with Department of the Air Force Manual (DAFMAN) 48-108, *Physical Evaluation Board Liaison Officer (PEBLO) Functions: Pre-Disability Evaluation System (DES) and Medical Evaluation Board (MEB) Processing*, the CIS is a mandatory document for the Initial Review-In-Lieu-Of (IRILO) and MEB disability processes. Per paragraph 3.11.3., the CIS should clearly describe how the unfitting condition(s) affect the member's ability to perform the duties of office, rank, grade and/or rating.

Additionally, in accordance with AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separations*, paragraph 1.2.8., commanders shall provide a non-medical assessment of the service member's ability to perform their current job and duties expected of their service member's current office, grade, rank, or rating using the AF Form 1185, *Commander's Impact Statement for Medical Evaluation Board*. The AF Form 1185 becomes an official part of the MEB case file.

Furthermore, per paragraph 2.6., the immediate commander submits a completed AF Form 1185 within five calendar days of the PEBLO's request, describing the impact of the service member's medical condition on the performance of military duties associated with their primary Air Force Specialty Code and ability to deploy or mobilize, as applicable. If the commander recommends their service member be retained, the commander must clearly demonstrate how their service member's retention serves Air Force interests and/or how the member's separation would adversely affect the unit or Air Force mission if the member is not returned to duty. The commander must also provide a copy of the CIS to the member, inform him/her of their retention recommendation, and obtain the member's signature acknowledging receipt. The member may make comments, but their signature only acknowledges that he/she was briefed by the commander but doesn't require the member's concurrence with the commander's assessment and recommendation. The Physical Evaluation Board also reviews this document when rendering its decision under the Disability Evaluation System (DES). However, it is not the sole basis for an unfit for duty determination.

The CIS is a mandatory document for disability processing in accordance with DAFMAN 48-108 and AFI 36-3212 and is not provided to any other personnel boards after disability processing is completed. Removal of this form from the DES case file after the fact would have no bearing on any other personnel actions.

The complete advisory opinion is at Exhibit G.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 13 Sep 22 for comment (Exhibit H), and the applicant replied on 25 Oct 22. In his response, counsel, on behalf of the applicant, contended the AFPC/DPFDD advisory describes how the CIS is made part of the MEB which then becomes part of the DES case file. The DES is restricted to personnel who perform disability functions; however, this has not been the case as applied to the applicant.

The applicant utilized the provisions of the Employee Assistance Program (EAP), established under the Technician Act of 1968, which afforded employees assistance for matters involving behavioral health, including MDD and PTSD. This led to absences from his place of duty. Despite providing documentation of his attempts to seek proper medical treatment, his absences were classified as "unexcused" and were used against the applicant in his evaluations.

The applicant's service history and prior OPRs demonstrated his capacity to undertake positions of greater complexity and responsibility. His only negative bullet point was written by his commander on 19 Apr 18. This negative statement failed to address the applicant's medical treatment, was written without context, and is not supported by the prior rater comments. The applicant's promotion to lieutenant colonel (O-5) was denied by the commander on 6 Mar 18. The only reason provided is "Member does not meet military standards at this time." During this timeframe, the commander served as a voting member on the promotion board and as the applicant's rater for his evaluation period and would have been aware of his medical treatment and reason for absences from work. Although EAP affords military technicians the opportunity to seek mental health treatment, it is apparent his use of this program led to negative bias toward the applicant.

The advisory opinion does not address that use of EAP to seek behavioral and mental health treatment was used against the applicant. Stemming from this bias, the applicant unfairly received an adverse OPR, was denied a well-deserved promotion, and had a biased CIS written against him. The adverse actions are counter to the intent of the Technician Act of 1968.

Finally, the advisory provides no explanation for the denial of the applicant's relief and should be rejected.

The applicant's complete response is at Exhibit I.

AIR FORCE EVALUATION

ARPC/PB recommendation is contingent upon amendment of the applicant's AF Form 707. The applicant was considered and not selected by the Calendar 2018 (CY18) Air National Guard of the United States (ANGUS) Line and Nonline Lieutenant Colonel Promotion Selection Board.

In accordance with Title 10, United States Code, Section 14502, *Special selection boards: correction of errors*, allows the Secretary of the military department concerned to convene SSBs if officers were not considered by a mandatory promotion board due to an administrative error or if officers were considered by a mandatory promotion board and were not selected due to a

material error. For officers who were considered but not selected due to a material error, the Secretary determines if the action of the mandatory promotion board was contrary to law in a matter material to the decision of the board or involved material error of fact or material administrative error; or the mandatory board did not have before it for its consideration material information.

Recommend approval of the applicant's request for SSB if his AF Form 707 is amended as a material error of fact would exist. If the applicant's AF Form 707 is not amended, recommend denial of SSB consideration as there is no evidence the promotion board acted contrary to law, nor would a material error of fact exist to warrant SSB consideration.

The complete advisory opinion is at Exhibit J.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 17 Nov 22 for comment (Exhibit K), and the applicant replied on 5 Jan 23. In his response, counsel, on behalf of the applicant, contended the ARPC/PB advisory does not provide a recommendation regarding the merits of the applicant's requested relief, and only recommends that if the OPR is changed, they would recommend approval of the request for SSB in lieu of the CY18 ANGUS Line and Nonline Lieutenant Colonel Promotion Selection Board. Alternatively, if the OPR is not changed, the advisory recommends not granting an SSB.

Since the advisory does not provide any arguments in favor or in opposition of the arguments provided by the applicant, he reaffirms his request for relief.

The applicant's complete response is at Exhibit L.

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, to include the applicant's rebuttals, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendations of ARPC/DPTS, AFPC/DPFDD, and ARPC/PB and finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant's OPR was completed in accordance with prevailing guidance, rendering need for correction, and a resulting SSB, moot. Additionally, the CIS is a mandatory document for disability processing, and the applicant failed to establish a nexus between this document and his failure to promote. Therefore, the Board recommends against correcting the applicant's records.
4. The applicant alleges he has been the victim of reprisal and has not been afforded full protection under the Whistleblower Protection Act (10 USC § 1034). By policy, reprisal complaints must be filed within one year of the alleged incident or discovery to facilitate the inspector general (IG) investigation. The applicant did provide a memorandum indicating he filed an IG complaint; however, the investigation was found to be unsubstantiated. Nevertheless, the Board reviewed the complete evidence of record to reach its own independent determination of whether reprisal occurred. Based on their review, the Board concluded the applicant has failed to provide substantial evidence to establish that he was reprimed against for making a protected communication. Therefore, in the absence of persuasive evidence to the contrary, the Board does not find that the applicant has been the victim of reprisal.

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 the 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-2021-02564 in Executive Session on 22 Feb 23:

, 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 6 Jul 21.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, NGB/A1PO, dated 15 Feb 22.
Exhibit D: Advisory Opinion, ARPC/DPTS, w/atch, dated 16 May 22.
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 7 Jul 22.
Exhibit F: Applicant's Response, w/atchs, dated 5 Aug 22.
Exhibit G: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 12 Sep 22.
Exhibit H: Notification of Advisory, SAF/MRBC to Applicant, dated 13 Sep 22.
Exhibit I: Applicant's Response, w/atchs, dated 25 Oct 22.
Exhibit J: Advisory Opinion, ARPC/PB, w/atch, dated 24 Oct 22.
Exhibit K: Notification of Advisory, SAF/MRBC to Applicant, dated 17 Nov 22.
Exhibit L: Applicant's Response, dated 5 Jan 23.

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