

**TOPIC**

Whether an active duty captain who is non-selected for promotion while in-the-promotion zone then later selected for promotion above-the-promotion zone and subsequently removed from the promotion list, remains eligible for a third consideration for promotion by the next selection board convened for the officer's grade and competitive category.

**TEXT OF THE DECISION**

For the reasons set forth below, an active duty captain who is non-selected for promotion while in the promotion zone and later selected for promotion above the promotion zone but subsequently removed from the promotion list shall be considered for all purposes to have twice failed selection. As a result, said captain does not remain eligible for a third consideration for promotion and, unless eligible for retirement under specific statutory conditions or chosen for selective continuation, is subject to involuntary separation from the United States Air Force.

**BACKGROUND**

A previous OpJAGAF dated August 1988 opined on this issue; however, we are now providing updated guidance based on federal law and we rescind our prior opinion.

**GUIDANCE**

Pursuant to 10 U.S.C. § 627, an officer below the grade of colonel who is in or above the promotion zone established for his/her grade and competitive category, and is considered but not selected for promotion by a selection board, shall be considered to have "failed of selection for promotion."

Title 10 U.S.C. § 632(a) states that an active duty captain who has failed of selection for promotion to the next higher grade for the second time shall, with limited exceptions, be discharged from the Air Force.

Title 10 U.S.C. § 629(e) addresses the effect of removal of an officer from a list of those recommend for promotion. According to Section 629(e), an officer in a grade below colonel, whose name was previously removed from a promotion list and is then either not selected for promotion by the next promotion board or his/her name is again removed from the list of officers recommended for promotion, shall be considered for all purposes to have twice failed of selection for promotion, thus triggering involuntary separation.

AFI 36-2501, *Officer Promotions and Selective Continuation*, 16 July 2004, paragraph 5.5.2 states that, "[w]hen an officer [below the grade of colonel] is considered and selected [in-the-promotion zone] or [above-the-promotion zone], but later removed from a report of a selection

board or a promotion list, the removal is deemed a non-selection for promotion.” Paragraph 5.5.2.2 goes on to clarify that, “[o]fficers not selected by the next board, or if selected and again removed from a report of a selection board or the promotion list, are determined to have been twice non-selected for promotion.”

Pursuant to AFI 36-3207, *Separating Commissioned Officers*, 9 July 2004, paragraph 3.4, officers who are not selected for promotion a second time to the grade of captain, major or lieutenant colonel are subject to involuntary separation.

## ***DISCUSSION***

In deciding that a third promotion opportunity was available to officers selected for promotion above the promotion zone, but subsequently removed from a promotion list, the OpJAGAF dated August 1988 focused on the interplay of the language in 10 U.S.C. § 629(c)<sup>1</sup> and in AFR 36-89, paragraph 4-4d.<sup>2</sup> The opinion relied on the following language from AFR 36-89: 1) an officer selected for promotion in the promotion zone or above the promotion zone but later removed from a promotion list “will be considered to be once failed of selection for promotion”; and 2) if the officer is not selected for promotion by the next board or is selected for promotion but “is again removed from the promotion list,” the officer will be considered to have twice failed of selection for promotion. It further noted that 10 U.S.C. § 629(c) held an officer whose name is removed from a promotion list continues to be eligible for promotion, reasoning therefore, based on the language of AFR 36-89, an above-the-zone selection for promotion followed by removal from the promotion list would not constitute a second non-selection unless the officer was either not selected by the next board or, if selected, his/her name is once again removed from the promotion list.

Although the language in AFI 36-2501, paragraph 5.5.2 is substantially similar to that in AFR 36-89, paragraph 4-4, there is one important distinction. Whereas AFR 36-89 indicated that an officer selected for promotion above the promotion zone but later removed from a promotion list “will be considered to be once failed of selection for promotion,” AFI 36-2501 now states when an officer selected for promotion above the promotion zone is later removed from a promotion list “the removal is deemed a non-selection for promotion.” (emphasis added). This change removed any ambiguity related to whether an above the zone selection for promotion followed by removal from the promotion list would constitute a first or second non-selection with regard to continued eligibility for promotion. Since an officer being considered for promotion above his/her promotion zone must necessarily have already been non-selected for promotion once, the clear language of AFI 36-2501 (consistent with 10 U.S.C. §§ 629 and 632) indicates that a subsequent non-selection, whether at the board or as a result of removal from a promotion list, will constitute a second non-selection for promotion. Absent retirement eligibility or selection for selective continuation, a second non-selection for promotion will subject the officer to involuntary separation under AFI 36-3207 and render him/her ineligible for further consideration for promotion.

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<sup>1</sup> The language appearing at 10 U.S.C. § 629(c) in 1988 is currently reflected in 10 U.S.C. § 629(e).

<sup>2</sup> The language that appeared in AFR 36-89, paragraph 4-4d, is now substantially reflected in AFI 36-2501, paragraph 5.5.2.

***CONCLUSION***

Based on 10 U.S.C. §§ 629(e) and 632(a), it is clear Congress intended that an active duty captain who is twice non-selected for promotion to major, whether due to non-selection by a promotion board or subsequent removal from a promotion list, will be subject to involuntary separation. We interpret Air Force guidance in line with that intent.

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