

PROMOTION EFFECTIVE DATE (PED)

Removal from FY09 (Second Half) Reserve of the Air Force Line and Non-Line First Lieutenant Select List

We have reviewed the subject promotion propriety action. Finding as we do that promotion removal is not available in the case of a second lieutenant projected for promotion to first lieutenant, we have evaluated this matter as a Not Qualified for Promotion (NQP) action that would be processed IAW AFI 36-2504, para 7.6¹. Notwithstanding significant errors and irregularities, the NQP action is legally sufficient, but hardly the model of complete command and legal staff work. Given the respondent's adjudged court-martial sentence of a dismissal for serious crimes, we recommend holding the NQP decision in abeyance pending final action by the SecAF on the decision to execute the dismissal after completion of the appellate review of her conviction and sentence.

Factual Background

The case file forwarded through command channels cited no pertinent facts supporting the desired action other than Subject's general court-martial conviction on 22 April 2009, and sentence to a dismissal and a \$6,000 fine. The AF Form 1359, *Report of Result of Trial*, was included in the notification to the respondent, and is included in the attached case file. Desiring something other than a minimal factual background upon which to base our advice to the Air Force Review Boards Agency, we have examined the public record of trial.

Subject was activated for service in the Air National Guard (ANG) of the United States from her position with the Fighter Wing, Base X. During her period of activation, she was in a federal status, on Title 10 orders, and subject to the Uniform Code of Military Justice. From 17 Sep 07 until 1 Apr 08, Subject performed temporary duty (TDY) at Base Y.

Subject filed interim travel vouchers every month that she was TDY; and, she filed a final settlement voucher on 9 Jul 08. During the period from October 2007 until March 2008, Subject submitted fabricated claims for lodging expenses not actually incurred by her. And, to substantiate her final settlement voucher, Subject submitted false lodging receipts, ostensibly showing her paying to reside at "Select Corporate Housing"; however, during this time, Subject resided at a "Kampgrounds of America" (KOA) facility in vicinity of her duty location near Location A. Testimony at trial established no record of her ever residing at Select Corporate Housing in any of its facilities.

At a general court-martial convened by the commander, Subject was convicted, contrary to her pleas, of stealing over \$500 of appropriated money belonging to the United States. Testimony at trial established the amount of the larceny to be \$10,768.07, which was the amount of money she had been paid by the Air Force in excess of the true lodging expenses she had incurred. Subject was also convicted of making a false claim for TDY expenses, which claim was false in the amount

¹[AFI 36-2504, Officer Promotion, Continuation and Selective Early Removal in the Reserve of the Air Force, 9 January 2003, Incorporating Through Change 5, 19 October 2007, Certified Current 22 January 2010.](#)

of \$20,235.00, and of making a false official statement to a finance NCO to the effect that Select Corporate Housing had charged her rent for the month of April as a penalty for leaving on short notice, which statement was totally false. In fact, at no time did Subject inform the NCO, or finance, that she had resided at a KOA campground.

A military judge sitting as a general court-martial convicted Subject of a violation of Article 121, Larceny of Military Property of the United States; Article 132, Making a False Claim against the United States, and, Article 107, False Official Statement. On 22 Apr 09, the military judge sentenced Subject to a dismissal and a \$6,000 fine. On 11 Aug 09, the findings and sentence of the court-martial were approved by the convening authority as adjudged. At the time of her offenses, the respondent was 31-32 years of age.

Procedural History

Subject was due to be promoted to the grade of first lieutenant on 14 Sep 09. After her conviction at trial by court-martial, on 19 May 09, the wing commander notified the respondent of the delay (by certified mail) until 14 Mar 10, of the promotion to first lieutenant. On 21 Jul 09, the wing commander notified the respondent (by certified mail) of his recommendation to remove her name from the select list. The respondent failed to acknowledge or respond to either action properly mailed on both occasions to her address on file with the USAF. On 27 Aug 09, the Adjutant General concurred with the removal; and, on 30 Oct 09, the Air National Guard, NGB/CF, concurred with the removal.

Legal Sufficiency – Promotion Removal v. NQP Action

The statutory authority of the President, IAW 10 U.S.C. § 14310, to remove an officer from a promotion list relates to officers in the grade of first lieutenant and above. This is the removal authority prescribed by AFI 36-2504, para 7.8, and upon which this promotion removal action is based.

However, the respondent is a second lieutenant; therefore, an action to affect her advancement in grade is not governed by 10 U.S.C. § 14310 and prescribing regulations. Instead, it is governed by AFI 36-2504, para 7.6, which provides a process for the SecAF to discharge a second lieutenant found Not Qualified for Promotion (NQP) to the grade of first lieutenant. This regulatory provision implements the statutory requirement, IAW 10 U.S.C. § 14503, that second lieutenants found NQP shall be discharged no later than eighteen months thereafter if they continue to remain NQP. Indeed, it is “DoD policy to discharge officers who are not qualified to be promoted to the grade of first lieutenant” as set forth by DoDI 1320.10, *Discharge of Commissioned Officers Not Qualified for Promotion to First Lieutenant of Lieutenant (Junior Grade)*, March 13 2007.² The complementary Air Force policy is articulated in AFI 36-2504 and AFI 36-3209, para 2.9³.

² [DoDI 1320.10, Discharge of Commissioned Officers Not Qualified for Promotion to First Lieutenant or Lieutenant \(Junior Grade\), 6 February 2014, para 3.](#)

³ [AFI 36-3209, Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members, 14 April 2005, Incorporating Through Change 3, 20 September 2011.](#)

Accordingly, there is neither statutory nor regulatory authority to remove a second lieutenant from an internal AF list of officers selected for promotion to the grade of first lieutenant; however, there is both statutory and regulatory authority to discharge a second lieutenant found NQP.⁴

Finding as we do that promotion removal is not available in the case of a second lieutenant projected for promotion to first lieutenant, we have evaluated this matter as a second lieutenant NQP action that should have been processed in accordance with AFI 36-2504, para 7.6. The two actions are functionally equivalent. Together they are the means to affect an advancement in grade; and, NQP is the only promotion propriety action that may be lawfully administered to a second lieutenant that would have the same consequence of removal: termination of an officer's advancement in grade.

Errors or Irregularities

The respondent was notified of this action as a promotion removal, and not as an action to find her NQP. Finding as we do that the two actions are functionally equivalent, this error does not affect the legal sufficiency of this action; however, IAW AFI 36-2504, Table 7.1, Rule 3, second lieutenant NQP notification letters are to include notice to the member that the action may result in their discharge. Such notification is absent in the present case. Notwithstanding this omission, we find such error harmless given that the statutory and regulatory consequence to terminating a second lieutenant's advancement in grade must in all cases lead to administrative discharge. Further, the underlying factual basis supported by the AF Form 1359, *Report of Result of Trial*, considered along with the entire record of trial, objectively supports NQP action; no reasonable officer might expect to continue to advance in grade or service under these court-martial findings supported by greater than a preponderance of evidence.⁵

Conclusion & Recommendation

We conclude that under the specific facts of this case where the respondent committed serious offenses, she is not prejudiced by re-characterizing this action as NQP when it had been initiated and served as a promotion removal. As the record demonstrates that she is not morally and professionally qualified for continued service at any grade, NQP action is legally sufficient; and, finding as we do that promotion removal is not available, the removal action is legally insufficient.

Given the respondent's adjudged court-martial sentence that includes a sentence to dismissal, we recommend holding the NQP decision in abeyance IAW AFI 36-2504, para 7.6.2, pending final action by the SecAF on the decision to execute the dismissal per Rule for Courts-Martial 1113(c)(2). Abeyance will avoid automatic separation of the respondent prior to final action on

⁴ We note, however, that AFI 36-2504, para 7.8.1, may lead one to conclude that removal is an alternative because it provides a process to "remove the name of any officer from a promotion list at any time"; however, what this paragraph fails to state is that the names of officers promoted to the grade of first lieutenant do not appear on promotion lists forwarded to the President and, therefore, are not subject to "removal" in the statutory sense.

⁵ [The fact that JAA found this "promotion removal" action legally sufficient is not controlling on other cases or actions. The errors and irregularities discussed herein, namely, the failure to follow the NQP process, could very easily result in a finding of an action not being legally sufficient with a slight modification of the facts.](#)

the adjudged court-martial sentence; and, if the court-martial sentence does not result in separation, then the NQP action must be processed to completion.

OpJAGAF 2010/3 12 January 2010

This opinion was certified current, as supplemented, on 20 March 2017.