

AFBCMR

Consideration at a Special Selection Board (SSB)

You requested an advisory opinion in regards to the application received from Major A (“applicant”). For the reasons set out below, we recommend you forward the case for action to the Chief, Promotion, Evaluation, and Recognition Division (HQ AFPC/DPPP) IAW 10 U.S.C. § 628 and AFI 36-2501, *Officer Promotions and Selective Continuation*, paragraphs 6.2.2 and 6.3.1. We further recommend you request, if the petition is denied by HQ AFPC/DPPP and returned to the AFBCMR, that AFPC provide an advisory opinion answering the following two questions:

a. Is there a process whereby some individuals’ promotion files or specific OPRs are “flagged” to indicate that the promotion board staff expects the file to be supplemented or the OPR completed immediately before or during a promotion board and, if so, how is that process documented; and

b. Would the applicant’s promotion file have been re-scored in light of AFI 36-2501, paragraph 2.21, if the Z promotion board (met 22 Feb XX, adjourned 1 Mar XX) successfully received, on 29 Feb XX, a completed OPR from the applicant with a close-out of 15 Feb XX?

Background

The applicant is a non-probationary officer. Between 22 Feb XX and 1 Mar XX her records met the Z promotion board for lieutenant colonel. The close-out date of her last OPR prior to the promotion board was 15 Feb XX. It was complete when signed by applicant on 29 Feb XX and loaded/routed in the virtual Personnel Center (vPC) immediately after signature. The OPR became a matter of record IAW AFI 36-2406, *Officer and Enlisted Evaluation Systems* (30 Nov 15), paragraph 1.4.3, sometime later when it was loaded by AFPC into the Automated Records Management System (ARMS). Therefore, when promotion board Z reviewed the applicant’s records, the most recent OPR included in her file closed out a little more than 12 months prior.

On 1 Jul XX, the applicant certified an application on DD Form 149, *Application for Correction of Military Record*. In Block 17, she wrote the following: “I request my application be considered by AFPC Officer Promotions before it is considered by the AFBCMR.” However, the application appears to have been routed directly to the AFBCMR.

Applicant’s Petition

The applicant requests that she be granted consideration at an SSB. She argues that her petition should be granted on two related bases under paragraphs 6.3.1 and 6.3.2 of AFI 36-2501. A third basis under paragraph 6.3.2 is not raised explicitly, but is alleged in the application.

Material Administrative Error / Failure to Consider Material Information that Should Have Been Available. The applicant argues that her OPR was complete during the promotion board’s proceedings, and that the failure to provide it to the promotion board under AFI 36-2501, paragraph

2.21, as new material, constituted administrative error. She assumes that there is an extant mechanism (“flagging”), formal or informal, that **should** have ensured the record was included in the promotion board under the normal course of business. She argues that this error was material due to the likely weight of the OPR in promotion board decisions.

Although the applicant believes, “Failure to Consider Material Information ...,” under paragraph 6.3.1.2 of AFI 36-2501, to be synonymous with material error of fact, it is more useful conjoined with material administrative error, as the absence of material information in that paragraph is only relevant if it “**should** have been available in compliance with pertinent Air Force directives and policies” (emphasis added).

Material Error of Fact. The applicant notes that the OPR in question covered more than 20 percent of her time as a major, including her primary leadership position at that grade, and contained a significant stratification from her rater (“#1 of 16 JAGs I’ve rated ... not even close!”). On this basis, the applicant argues that the omission of the OPR resulted in the decision of the board regarding her promotion arising from a material error of fact. If this contention is accepted by the AFBCMR or HQ AFPC/DPPP, it would indicate that if the OPR **could** have been included (not only ‘should’ as above), then its importance to the board’s decision-making renders its omission material error.

Injustice. Although the applicant does not present this as a basis of relief, the applicant further alleges that the omission of her OPR constitutes injustice. She argues that she was informed of a method of “flagging,” formal or informal, that would have resulted in her OPR being considered at the promotion board. She alleges that this process is not published, and therefore its unequal application results in injustice to those who are not informed of its existence. Our review of time-sensitive, expedited OPR processing raises a similar concern. Although HQ AFPC/DPPP does not have authority under AFI 36-2501, paragraph 6.3.1, to direct an SSB on this basis, the AFBCMR can grant SSBs, “when they determine an officer’s nonselection for promotion resulted because of an error or injustice in the officer’s record.”

Discussion

Method of Application

Under 10 U.S.C. § 628 and AFI 36-2501, paragraphs 6.2.2 and 6.3.1, HQ AFPC/DPPP has the authority on behalf of SecAF to direct an SSB for an officer when, insofar as is relevant to this applicant, board action was contrary to law, involved material error of fact or administrative error, or where the board did not consider material information that should have been available. In paragraph 6.4 of that AFI, instructions are also purportedly provided for “submitting appeals for SSBs.”

The two categories of application described by paragraph 6.4 are (1) applications submitted under 10 U.S.C. § 1552 and AFI 36-2603, *Air Force Board for Correction of Military Records*, (5 Mar 12) using DD Form 149; and (2) applications submitted under AFI 36-2401, *Correcting Officer and Enlisted Evaluation Reports*, which has since been superseded by AFI 36-2406, using AF IMT 948, since superseded by AF Form 948, *Application for Correction/Removal of Evaluation Report*.

Neither category of report appears to encompass the authority referenced in AFI 36-2501, paragraph 6.3.1. The first category clearly references only AFBCMR application by specifying AFI 36-2603 and 10 U.S.C. § 1552. Likewise, the second category seems clearly inapposite. AFI 36-2406 restricts its discussion of SSB consideration to only those requests in conjunction with an appeal of an evaluation (see paragraph 10.7.1), and AF Form 948 does not appear to contemplate application for SSB consideration in the absence of correction of an evaluation.

The grounds that justify HQ AFPC/DPPP to direct an SSB under paragraph 6.3.1 are not exclusive to correction or removal of evaluations, nor are they derived from the AFBCMR's governing law and regulation. The authority for the applicant's petition to HQ AFPC/DPPP under paragraph 6.3.1 is instead derived from DoDI 1320.11, *Special Selection Boards* (12 Feb 13), paragraph 3.a, and thence from 10 U.S.C. § 628. It therefore appears that the applicant's attempt to apply to HQ AFPC/DPPP for an SSB via DD Form 149 is a reasonable effort to comply with an incomplete instruction. In the absence of appropriate means of petition specified by instruction, we recommend the application be forwarded to HQ AFPC/DPPP in its current form with a recommendation to act on it as provided.

Timeliness

The application is timely to the AFBCMR under 10 U.S.C. § 1552(b) and AFI 36-2603, paragraph 3.5. Although timelines for application to HQ AFPC/DPPP under AFI 36-2501, paragraph 6.3.1, are permissible under 10 U.S.C. § 628(j)(2)(B), extant regulation does not appear to provide such timelines. In the absence of a timeline specified by instruction, petition by the applicant to HQ AFPC/DPPP within four months of the promotion board appears reasonable and timely.

Reasonable Diligence

As a threshold matter, AFI 36-2501, paragraph 6.3.3, prohibits granting an SSB to a member when, "by exercising reasonable diligence, the officer should have discovered the error or omission and could have taken corrective action before the originally scheduled board convened." Reasonable diligence, in this case, appears to lie in timely completion of the OPR itself and appropriate routing of the completed OPR. As the OPR was completed on 29 Feb 16, 14 days after the applicant's close-out date, and the applicant indicates she completed her portion (the ratee acknowledgement) the morning of the day she received it, the completion of the document appears to be reasonably diligent.

Virtual Personnel Center is the AF designated system for routing evaluations both within the unit and MPS, through final processing, and to AFPC (see AFI 36-2406, paragraph 1.6.10.5). In the absence of any instruction describing supplemental procedures required from the ratee upon completion of an OPR immediately before or during a promotion board, the applicant's reliance on the electronic vPC system appears reasonably diligent.

Substantive Claims by Applicant

Under AFI 36-2501, paragraph 2.11.1, one of the items of information meeting each promotion board is the officer selection record (OSR) as outlined in AFI 36-2608, *Military Personnel Records System* (26 Oct 16). As described by paragraph 1.5.1.1 of this instruction, documents included in the OSR group are maintained in electronic form within ARMS, to include AF Form 707, *Officer Performance*

Report (see Attachment 2, Column D, Row 86). AFI 36-2406, paragraph 1.4.3.1, notes that until filed in ARMS, completed OPRs are not considered a matter of record, and are instead classified as, “working copies.”

Procedurally, AFI 36-2406, paragraphs 1.4.2.3.2 – 1.4.2.3.3, require that completed OPRs are filed in ARMS “no later than 60 days after the close-out.” If we account for the timeline on delivery to the MPS (NLT 30 days after close out) and to AFPC (NLT than 45 days after close out), then we can infer a 30-day processing limit after completion, with shared responsibility in the MPS and AFPC.

The only instruction that appears to establish special responsibilities for processing OPRs immediately prior to promotion boards is in the Total Force Personnel Services Delivery (PSD) Guide, *Evaluations*, Version 3 (30 Nov 15). In that document, Tab 2, Section E, paragraph 8.h, explains that if “time sensitive” OPRs are required for immediate update, then the rater or designated representative ensures an email is sent direct to AFPC notifying them of the urgency and citing the vPC identifier. It is important to note, however, that although this guide purports to assign responsibilities to the rater, AFI 36-2406 does not mandate general rater familiarity or compliance with the contents of the PSD guide (use of the guide is mandated for the MPS under paragraph 1.6.10.1).

The applicant has also raised the possibility of a mechanism for “flagging” promotion board files or specific OPRs to indicate the need for and support expedited processing when OPR completion is immediately before or during a promotion board. If such a mechanism exists, formal or informal, it must be evaluated to determine whether it establishes a duty. Prior to AFBCMR decision, AFBCMR should request AFPC provide an advisory opinion specifying the existence and details of such a mechanism. If such a mechanism exists, we recommend you request a supplemental advisory opinion from this office to re-evaluate the case in light of this fact.

The remainder of this analysis presumes such a “flagging” mechanism does not exist.

Material Administrative Error / Failure to Consider Material Information that Should Have Been Available. In the absence of a duty established in law or regulation which directs the applicant’s OPR to be placed in her promotion file on an expedited basis, the standard timeline applies. Under the standard timeline, it does not seem that the applicant’s OPR **should** have been included in promotion board Z. There is no basis therefore to grant the applicant’s petition for administrative error or failure to consider material information under AFI 36-2501, paragraphs 6.3.1 and 6.3.2.

Material Error of Fact. There is, however, at least one mechanism established for expedited processing of time sensitive OPRs. This raises an issue as to whether the applicant’s OPR **could** have been included in the promotion board. The document, once signed and loaded into vPC, does not appear to have any impediments to receipt by the promotion board staff in a matter of hours. Therefore, prior to AFBCMR decision, AFBCMR should request AFPC provide an advisory opinion specifying the effect on promotion board Z if the promotion board staff had received the applicant’s OPR on 29 Feb XX.

If AFPC indicates the applicant’s records would have been re-scored in accordance with AFI 36-2501, paragraph 2.21, then the AFBCMR will need to determine the importance of the

information contained in the applicant's omitted OPR. The applicant argues for its importance because it represents approximately 20 percent of her time as a major, her most significant leadership role, and includes a significant stratification from her rater ("#1 of 16 JAGs I've rated ... not even close!"). If the AFBCMR agrees with the applicant that it is of such importance that its omission resulted in material error of fact in the record presented to the promotion board, and it could have been included therein, then the SSB requested by the applicant should be granted.

Injustice. If the applicant's OPR could have been included in the promotion board, but was not because of the rater's failure to pursue time-sensitive, expedited processing, and the AFBCMR determines its omission does **not** constitute material error of fact, then the AFBCMR must further determine whether the failure to include the OPR constitutes an injustice suitable for action. We do not have access to statistics on what percentage of personnel meet their lieutenant colonel promotion board without the inclusion of their most recently closed-out OPR, and such an inquiry seems beyond the scope of the board's responsibilities.

In this instance, the AFBCMR must balance competing factors based on their general understanding. On the one hand, it seems certain that all efforts are normally made by the command chain to ensure the member meets the promotion board with the OPR representing their greatest scope of responsibility included. This may point to omission of the applicant's records representing an injustice. On the other hand, many members may have close-out dates, through no fault of their own, that are either during or immediately after promotion board dates, resulting in significant gaps in rating without recourse to expedited processing. The AFBCMR will have to compare these competing factors.

Recommendation

For the reasons set out above, we recommend you forward the case for action to HQ AFPC/DPPP IAW Title 10 U.S.C. § 628 and AFI 36-2501, paragraphs 6.2.2 and 6.3.1. We further recommend you request, if the petition is denied by HQ AFPC/DPPP and returned to the AFBCMR, that AFPC provide an advisory opinion answering the following two questions:

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We invite the opportunity to provide a supplemental advisory opinion if AFPC answers in the affirmative to question (1) above, and will clarify if requested the above discussion with specific recommendations in all other cases where the application is returned to the board.