

**TOPIC**

Current rationale for removal from promotion list being insufficient with evidence provided by command.

**TEXT OF THE DECISION**

This opinion is in response to an inquiry regarding the legal sufficiency of a Promotion Removal Action based on weak supporting evidence provided by command. It is recommend that the package be revised with the substantiated allegations addressed by non-judicial punishment as the basis for the removal recommendation, supporting documentation be added, and it be proposed by a new proposing commander.

**BACKGROUND**

Respondent was selected for promotion to lieutenant colonel. At the time of her selection, Respondent's previous commander had given her a "definitely promote" recommendation. She was supposed to pin on 1 January 2014.

On or about 30 September 2013, Respondent was offered non-judicial punishment following a commander-directed investigation (CDI) for having an unprofessional relationship with an enlisted member. Specifically, it was alleged that she shared activities, such as personal travel and off-duty employment with a female master sergeant. Further, it was alleged that she entered into business with the master sergeant to sell weight-loss products.

Respondent accepted the non-judicial punishment and was found guilty of the above allegations on 23 December 2013. As punishment, she forfeited \$1,000 pay per month for two months and was reprimanded. The reprimand stated Respondent showed a "remarkable lack of good judgment," used government email to solicit others to buy a product, and "brought discredit upon [her]self, [her] unit and the United States Air Force."

On 22 October 2013, Respondent's Commander recommended Respondent's promotion to lieutenant colonel be delayed. This delay was due to the misconduct documented in the CDI and resulting non-judicial punishment action (unprofessional relationship). The delay was approved until 1 July 2014.

On or about 28 January 2014 (finalized on 10 March 2014), Respondent received a referral OPR for the above-described conduct. At the time, she had served in the Air Force for 19 years.

Respondent did not promote on 1 July 2014 because command never recommended to SecAF to have the delay terminated.

On 7 November 2014, Respondent's new commander recommended her promotion delay end, and she be retroactively promoted effective 1 January 2014. Respondent's Commander opined that

Respondent was fully qualified to assume the higher grade and cited 75 character letters submitted by Respondent. During the time period between the conduct being discovered, the end of the non-judicial punishment action and the original date of promotion, Respondent's new Commander who recommended the removal was not Respondent's supervisor nor commander. Based on her observations after 28 February 2014, Respondent's Commander opined that Respondent was fully qualified for promotion.

To justify that Respondent was fully qualified for promotion as of the date of 1 January 2014, Respondent's new Commander relied on a letter (dated 25 September 2014) from a prior instructor. The letter stated, based on personal observations and interactions with Respondent's leadership, that Respondent met standards and was qualified for promotion on 1 January 2014. While not mentioned directly by Respondent's new Commander, the package at the time also included a letter from another prior instructor from March 2012 until February 2014. He also concurred that Respondent was qualified as of 1 January 2014. The AF Form 4364 had several attachments including the non-judicial punishment action and the CDI with attachments. In a response dated 6 November 2014, Respondent concurred that the promotion delay should be terminated. This package was never signed by Respondent's wing commander.

On or about 14 January 2015, Respondent's new Commander stated on Respondent's officer development plan that she "has proven herself high-performing, knowledgeable, flexible and mission-dedicated as the Trainee Health Surveillance Flight Commander. She displays officership, is a proactive problem solver, and enthusiastically takes on complicated challenges."

On or about 17 February 2015, Respondent's OPR for 2014-2015 was finalized. It was positive about her duty performance with a push for Senior Developmental Education.

On 23 February 2015, Respondent's new Commander withdrew the 7 November 2014 recommendation for Respondent's promotion. She served a new AF Form 4364 now recommending that Respondent be removed from the promotion list. In her rationale, she stated "[a]fter careful consideration of the facts presented in the case file, I recommend that your name be removed from the promotion list." We do not know what the "case file" was as no attachments are listed on the new form to support this basis. The non-judicial punishment action was not discussed.

On 24 March 2015, Respondent's Commander withdrew the package again and re-served another AF Form 4364; providing a more specific rationale for the recommendation to remove Respondent from the promotion list. In her rationale, she acknowledges that twice she has recommended the the promotion delay be terminated and the promotion be reinstated. However, Respondent's Commander now concluded Respondent "lacks the requisite professional qualifications for promotion." She stated Respondent has frequent, unexplained absences from her duty section, late suspenses and that she has "failed to exhibit the type of initiative necessary to lead at the next grade." The rationale provides no specific instances of conduct, and there were no attachments at all on this AF Form 4364.

On 17 April 2015, Respondent submitted a three-inch binder response with 43 tabs, and alleged Respondent's Commander was pressured into this reversal of position. She said her commander

told her that the wing commander was reluctant to endorse a recommendation for promotion because MAJCOM/CV might perceive it as disrespectful. Respondent stated that she was out of the office frequently as the investigating officer on a CDI. In example after example, she cited conversations with her chain of command complimenting her performance and supporting her during this time period. She submitted copies of her calendar and various leave and duty reports to account for her time. Respondent submitted the original SSS signed by the Staff Judge Advocate. This document contains legal advice directed to the vice and wing commander. Respondent should never have had access to this document. However, it appears that legal advice meant for command has routinely been provided to Respondent. For example, Respondent described (with varying degrees of accuracy) conversations between Respondent's Commander and the legal office. This breach of attorney client privilege makes all released advice effectively unprotected.

## ***GUIDANCE***

### ***Promotion Delay***

Per AFI 36-2501, paragraph 5.4, a commander may take action to delay a promotion if there is cause to believe that the officer has not met the requirement for exemplary conduct set forth in Title 10, U.S.C. 8583 or is not mentally, physically, morally, or professionally qualified to perform the duties of the higher grade. The reviewing commander may approve an initial delay up to 6 months from the officer's original effective date of promotion. When a reviewing commander initiates a promotion delay, it remains in effect until terminated by proper authority, which is SecAF.

### ***Promotion Removal***

Per AFI 36-2501, paragraph 5.6, a commander may take action to remove an officer's name from the promotion list when a *preponderance of the evidence* demonstrates that the officer has not met the requirement for exemplary conduct (10 U.S.C. § 8583) or is not mentally, physically, morally, or professionally qualified to perform the duties of the higher grade. The reasons for the action are supposed to be as specific as possible and *copies of any supporting materials* should be attached (and listed on AF Form 4363/4364). An action begun as a delay may be converted by higher authority to a removal. The decision authority for removal is SECAF or designee.

## ***DISCUSSION***

Was the promotion delay supposed to end on 1 July 2014? **No.** While the first six months of a delay can be approved at a lower level, only SECAF can end the delay. This process often takes longer than the original six month delay. However, SecAF has the authority to approve retroactive restoration of grade (and pay) to remedy this process delay. It is the responsibility of command to request that any delay be terminated.

Is there a viable allegation of unlawful command influence? **No.** Unlawful command influence is a concept from the Uniform Code of Military Justice. While we use it in conversation, it only applies to courts-martial process and non-judicial punishment actions. Removal recommendations

are not governed by the UCMJ. Removal is appropriate for this topic to be discussed between commanders. However, if Respondent's Commander does not want to recommend removal from the promotion list, then she should withdraw her recommendation.

Is the current basis for removal from the promotion list without supporting documentation sufficient, i.e., meeting the by a preponderance of the evidence standard? **No.** The allegations are vague and have *no supporting documentation*. In contrast, Respondent very successfully refuted by a preponderance of the evidence that she exhibited poor performance in any way. She presented her schedule, emails between her and leadership about her absences, her officer development plan, etc., all of which undermine Respondent's Commander's rationale.

Is there a supportable basis for removal? **Yes.** Removal could be based on the underlying misconduct investigated in the original CDI and non-judicial punishment action. At the time of her selection, the selection board did not know about Respondent's misconduct. Her selection was not based on her record as it stands now. Officer non-judicial punishment actions are very rare. In 2013, less than 2% of Air Force members received non-judicial punishment actions. Less than 1% of all Air Force officers ever receive a non-judicial punishment action in their career. By this measure, Respondent is in the bottom 1% of all Air Force officers.

If we want to pursue removal, what can be done? There are two options. First, the current package can set forth the specific substantiated allegations of misconduct and list all supporting evidence, the amended package would have to be served on Respondent who must be offered an opportunity to respond. Second, the package can be withdrawn and re-drafted with the substantiated allegations addressed by the non-judicial punishment action/CDI as the basis and as attachments. If re-drafted, we recommend given the alleged suggestion that the recommending commander is being coerced into submitting this package, that the proposing/recommending commander be either Respondent's Group Commander, or the wing commander. We believe that option two is the best option.

## ***CONCLUSION***

Based on the foregoing, we conclude that the PPA package is not legally sufficient to support removal from the promotion list. The recommended course of action is to redraft the package with a supportable basis and have the reviewing commander (wing commander or equivalent) also serve as the recommending commander.

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