



UNITED STATES GENERAL ACCOUNTING OFFICE  
WASHINGTON, D.C. 20548

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*Released*

IN REPLY  
REFER TO: - B-191809

OFFICE OF GENERAL COUNSEL

The Honorable Barbara Allen Babcock  
Assistant Attorney General  
Civil Division  
Department of Justice

MAY 31 1978

Attention: LeRoy Southmayd, Jr., Attorney  
Court of Claims Section

Dear Ms. Babcock:

Subject: v. United States  
Court of Claims No. 166-78

This is in response to your letter of April 26, 1978 (file reference BAE:JFM:LS:smc 154-166-78), and statutory call form of the same date, requesting a report on the above-captioned case.

We have found no record of any claim filed with the General Accounting Office on account of the matters set forth in the petition, or of any claim upon which a cross action against the plaintiff could be based. We also have no information as to the facts of this case other than what is stated in the petition.

According to the petition, the plaintiff, Staff Sergeant \_\_\_\_\_, USAF, while serving on active duty as an officer in the Air Force, was promoted to temporary major on October 1, 1971. However, the Air Force boards selecting for promotion to permanent major that convened on July 8, 1974, and August 18, 1975, did not select him.

On April 29, 1976, Sergeant \_\_\_\_\_ was honorably discharged from the Air Force for having twice failed of selection to permanent major, in accordance with 10 U.S.C. § 3303 (1970). He enlisted in the Air Force in the grade of sergeant on July 27, 1976.

Petitioner contends that his 1971-1972 and 1972-1973 Officer Effectiveness Reports (OERs), in which he was not rated as highly as he had been previously, caused his nonselection.

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However, by a letter dated August 22, 1975, Sergeant [redacted] major command was advised that the Officer Personnel Records Review Board had voided the 1971-1972 OER, pursuant to his request. It was removed from his selection folder that day.

On April 22, 1976, Sergeant [redacted], pro se, filed an application for correction of his military records under 10 U.S.C. § 1552 (1970) with the Air Force Board for Correction of Military Records (AFBCMR), in which he requested voiding of his failures of selection. Petitioner contends that as part of the processing of his application the Directorate of Personnel Program Actions (DPPA), Air Force Military Personnel Center, submitted an advisory opinion to the AFBCMR in which it was recommended that Sergeant [redacted] application be denied. The AFBCMR on August 18, 1976, recommended that Sergeant [redacted] 1972-1973 OER be voided but denied without a hearing his requests that his failures of selection be voided.

On April 18, 1977, Sergeant [redacted] through counsel, filed another application with the AFBCMR for correction of his records which has not yet been acted upon.

Sergeant [redacted] alleges that the erroneous and unjust aspects of the now-voided OER's led to his failures of selection and his resultant loss of commissioned status. He also alleges that the DPPA advisory opinion was unjust and erroneous, that it caused the AFBCMR to deny him relief, and that the denial was, accordingly, arbitrary, capricious, contrary to law and regulation, and violative of his constitutional right to due process of law.

Sergeant [redacted] further alleges that the Assistant Secretary of the Air Force, acting through the AFBCMR in the adjudication of his April 22, 1976 application, failed to grant him thorough and fitting relief and this failure was arbitrary, capricious, contrary to governing law and regulation, and violative of his right to due process of law.

Sergeant [redacted] seeks an order from the Court of Claims directing the Secretary of the Air Force to correct his military records to show, among other things, that he was promoted to permanent major as a result of his selection by the July 8, 1974 selection board and that he has continued to serve on active duty instead of being discharged on April 29, 1976. He also seeks a judgment for the active duty pay and

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allowances of a major for the period of April 29, 1976, through the present, less any other active duty pay and allowances paid to him during that period.

To obtain relief, Sergeant \_\_\_\_\_ has the burden of showing by cogent and clearly convincing evidence that the refusal of the Secretary of the Air Force acting through the correction board, to correct his records, was arbitrary and capricious. \_\_\_\_\_ v. United States, 200 Ct. Cl. 626 (1973). To make this showing, it must be clear that his failure of selection for promotion to permanent major was due solely to the erroneous information contained in the voided OERs, that he unquestionably would have been promoted except for these OERs. \_\_\_\_\_ v. \_\_\_\_\_, 501 F.2d 175 (5th Cir. 1974); \_\_\_\_\_ v. \_\_\_\_\_, 403 F. Supp. 290 (D.C. D.C. 1975).

Regarding Sergeant \_\_\_\_\_ allegations that the Air Force's failure to correct his records constitutes a denial of his right to due process of law, in \_\_\_\_\_ v. \_\_\_\_\_, *id.*, it was held that in situations such as the instant, there is not a sufficient liberty or property interest for there to be a due process requirement.

Further inquiry concerning this matter may be addressed to Miss Ellie Harris, telephone number 275-5422.

Please keep us advised of the progress of this case.

Sincerely yours,

Edwin J. Monsma

Edwin J. Monsma  
Assistant General Counsel