

**THE OFFICER PROMOTION RE-LOOK PROCESS:  
A PRACTITIONER'S GUIDE TO SPECIAL SELECTION  
BOARDS**

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*As a legal assistance attorney at a small Army installation, you are scheduled to meet with three officers recently nonselected for promotion: Captain Latoer, Major Correction, and Lieutenant Colonel Leftout. Each officer is seeking advice on his or her promotion re-look options. Since you are unfamiliar with this issue, you scan your Basic Course materials frantically looking for any relevant information to help you assist them. You find nothing. Do not panic; this article can help.*

#### I. Introduction

The mission of officer promotion selection boards is to recommend qualified officers for promotion. Conversely, selection boards also identify those who are not qualified for advancement. Occasionally, due to an administrative or process error, a board will not recommend an officer for promotion who is otherwise qualified. Accordingly, a second special

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selection system exists to reconsider officers for promotion who can demonstrate that some mistake caused the original board to nonselect them.<sup>2</sup> As in the above legal assistance scenario, nonselected officers may seek legal advice from a judge advocate concerning this “re-look”<sup>3</sup> process. The purpose of this article is to provide the practitioner with a guide to the Army’s officer promotion re-look system.

The engine of this re-look process is the Special Selection Board (SSB).<sup>4</sup> Congress created the SSB in 1981 as a part of the Defense Officer

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2. Generally, the next regularly convened promotion board for the same competitive category and rank will reconsider any officer previously nonselected for promotion. If, however, an officer is twice nonselected for promotion (to captain, major, or lieutenant colonel), discharge or release from the service or retirement, if eligible, may be the result. U.S. DEP’T OF ARMY, REG. 600-8-29, OFFICER PROMOTIONS para. 1-13(a) (30 Nov. 1994) [hereinafter AR 600-8-29] (stating that discharge or release will be in accordance with “AR 635-120” and “635-100” which have been superceded by U.S. DEP’T OF THE ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (29 June 2002) [hereinafter AR 600-8-24]). The provisions for mandatory discharge or retirement, however, will not apply to captains or majors approved for selective continuation or within two years of voluntary retirement. AR 600-8-29, *infra*, para. 1-14. Also, officers who refuse to continue serving after being chosen for selective continuation may forfeit any right to separation pay. U.S. DEP’T OF DEFENSE, REG. 7000.14 - R, DEPARTMENT OF DEFENSE FINANCIAL MANAGEMENT REGULATION para. 350202.M (Nov. 18, 2002) (stating that a Regular Army officer who declines continuation for a period of time that would make him or her qualified for retirement is ineligible for separation pay).

3. The term “re-look” appears frequently throughout this article. Although not found in any statute, directive, or regulation, the term exists in military parlance and means “promotion reconsideration.” While this article specifically discusses only commissioned officers, its information applies equally to warrant officers.

4. A SSB is defined by U.S. DEP’T OF DEFENSE, DIR. 1320.11, SPECIAL SELECTION BOARDS encl. 1, para. 1.4 (May 6, 1996) [hereinafter DOD DIR. 1320.11].

A panel of officers convened under Section 628 or 14502 of [Title 10 of the U.S. Code] to evaluate and recommend commissioned officers on the Active Duty List or the Reserve Active Status List and warrant officers on the warrant officer Active Duty List for promotion consideration because the officer was not considered due to administrative error, or following a determination that the action of a board that considered and did not select the officer was contrary to law or involved a material error of fact or material administrative error, or if the board did not have before it for its consideration material information. Special Selection Boards make select and nonselect recommendations, as distinguished from providing advisory opinions as to whether an officer would have been selected had an officer been properly considered by the original board.

*Id.*

Personnel Management Act (DOPMA).<sup>5</sup> The SSB provisions of that legislation<sup>6</sup> changed the previous promotion re-look board process that involved the non-statutorily created Standby Advisory Board (STAB).<sup>7</sup> Unfortunately for the practitioner, the legislative history of the DOPMA provides little information relative to the creation of the SSB;<sup>8</sup> and since then, the courts have developed very little case law interpreting the stat-

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5. The Defense Officer Personnel Management Act, Pub. L. No. 96-513, 94 Stat. 2835 (1980) [hereinafter DOPMA] (codified as amended at 10 U.S.C. § 611 (2000)). Congress enacted similar legislation for the Reserve Component (RC) through the Reserve Officer Personnel Management Act, Pub. L. No. 103-337, 108 Stat. 2921 (1994) [hereinafter ROPMA].

6. DOPMA, Pub. L. No. 96-513, tit. I, § 105, 94 Stat. 2859 (1980) (codified as amended at 10 U.S.C. § 628)). Congress instituted the SSB for the RC by ROPMA, Pub. L. No. 103-337, div. A, tit. XVI, subsect. A, pt. I, 1611, 108 Stat. 2947 (1994) (codified as amended at 10 U.S.C. § 14502 and became effective on 1 October 1996).

7. See Major David Bent, *DOPMA: An Initial Review*, ARMY LAW., Apr. 1981, at 3 (noting that DOPMA was the first major revision of military officer personnel law since the Officer Personnel Act of 1974). Specifically for the Army, the SSB replaced the non-statutory Standby Advisory Board (STAB) as the standing promotion re-look mechanism. The key change for the SSB from the STAB is the authority to actually select officers for promotion rather than merely recommend promotion.

Before DOPMA, no statutory board existed to make promotion decisions following an officer's nonselection by an original selection board under circumstances warranting a re-look. The STAB existed merely by virtue of military regulation. See *Porter v. United States*, 163 F.3d 1304, at 1313 (Fed. Cir. 1998), cert. denied, 120 S. Ct. 41 (1999). A STAB could act in lieu of the original promotion board or render an advisory opinion to a civilian correction board. See *Evensen v. United States*, 654 F.2d 68 (Ct. Cl. 1981) (noting that STAB was convened to replicate, or act in lieu of, the original selection board); *Braddock v. United States*, 9 Ct. Cl. 463 (1986) (noting STAB was convened to tender an advisory opinion to the civilian correction board on the officer's likelihood of promotion based on his corrected record). The purpose of an advisory opinion would be to assist the correction board in making a determination of whether an error in an officer's record was prejudicial or harmless in relation to a promotion nonselection. See *Braddock*, 9 Ct. Cl. at 463. If a STAB recommended an officer for promotion, the corrections board would then consider any error it had removed from the officer's file as "prejudicial." Consequently, the board would expunge any evidence of the nonselection from the officer's records and recommend that the Service Secretary promote the officer.

8. H.R. REP. NO. 96-1462, at 74 (1980), contains the only commentary on 10 U.S.C. § 628. The HOUSE REPORT merely states that "[t]he purpose of this subsection is to provide a means to make a reasonable determination as to whether the officer would have been selected if his pertinent records had been properly considered by the prior board, unfettered by material error." 10 U.S.C. § 628 (2000).

ute.<sup>9</sup> Consequently, the practitioner assisting an officer with a promotion re-look must also become familiar with the applicable directive<sup>10</sup> and regulation<sup>11</sup> that implement the statute and the various Army policies<sup>12</sup> that govern the reconsideration process and the SSB procedure.

This article provides a broad overview of the promotion reconsideration process, beginning with a discussion of the basic requirements and prerequisites for a re-look. To initiate the re-look process, an aggrieved officer must demonstrate that some material error in the original selection

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9. The major case to address the SSB is *Porter*. See *Porter v. United States*, 163 F.3d at 1304. Porter was twice nonselected for promotion to captain in the Air Force and was involuntarily separated. Thinking his initial nonselection to be the result of a faulty Officer Evaluation Report (OER), he applied to the Air Force Board for the Correction of Military Records (Air Board) for correction of his record to exclude the challenged OER and reconsideration of his promotion by a SSB. The Air Board removed the faulty OER from his records and recommended that the Secretary of the Air Force convene a SSB to reconsider him for promotion. The Air Board did not, however, recommend voiding Porter's previous nonselections. Such a recommendation would have removed the legal basis for his discharge, resulting, at a minimum, in constructive reinstatement and entitlement to back pay. Porter challenged the Air Board's unwillingness to make such a recommendation by filing suit in the Court of Federal Claims. Porter argued that the Air Board lacks authority to refer his record to a SSB absent the voiding of the previous nonselections. The Court of Federal Claims agreed with him and the government appealed the decision to the Court of Appeals for the Federal Circuit. The Federal Circuit reversed the Claims Court and upheld the Air Board's decision to refer Porter's record to a SSB without voiding the previous nonselections. In doing so, the court provides extensive statutory interpretation of 10 U.S.C. § 628 that is useful to the practitioner. *Id.*

Note that the majority of reported military promotion re-look cases involved a STAB and the application of a harmless error test to the decisions of the STAB. The Court of Appeals for the Federal Circuit announced the death of the harmless error rule in *Porter v. United States*, shifting the focus in SSB cases to the issue of whether "a SSB has achieved its statutory function of producing a reasonable determination of the officer's original promotion prospects." *Id.* at 1325. As a result, the case law that developed around military promotion cases and the STAB appears inapplicable to promotion nonselections occurring after the advent of the SSB.

10. DOD DIR. 1320.11, *supra* note 4 (implementing 10 U.S.C. §§ 628, 14502 and establishing the policy and responsibilities regarding the use of SSBs for commissioned officers on both the Active Duty (AD) and RC Lists and chief warrant officers and commissioned warrant officers on the warrant officer AD and RC Lists).

11. AR 600-8-29, *supra* note 2, ch. 7 (providing basic information on the promotion re-look process).

12. Deputy Chief of Staff for Personnel (DCSPER), Standing Operating Procedure (SOP) (27 Sept. 1994) [hereinafter DCSPER SOP] (attached to a memorandum signed by Acting DCSPER Major General Wallace C. Arnold); SECARMY Memorandum of Instructions for President and Members of Special Selection Board (May 29, 1998) [hereinafter SSB MOI].

board process justifies promotion reconsideration. The second section of the article focuses on the nonselected officer's written request to the Department of the Army for a SSB to reconsider promotion. Only a well-drafted request for reconsideration will withstand the close scrutiny of the applicable re-look approval and denial authorities. The concluding section of the article examines the operations of the SSB, which parallel the composition and procedures utilized by normal selection boards. The article then focuses on the legal assistance scenario as a reference point for practical guidance, and to highlight important aspects of the promotion re-look process.

## II. Getting Started: Promotion Re-look Basics

As a starting point, the original promotion selection procedure must have followed the law.

The documents that are sent to a Selection Board for its consideration therefore must be substantially complete, and must fairly portray the officer's record. If a Service Secretary places before the Board an alleged officer's record filled with prejudicial information or omits documents equally pertinent which might have mitigated the adverse impact of the prejudicial information, then the record is not complete, and it is before the Selection Board in a way other than as the statute prescribes.<sup>13</sup>

Officers who are convinced that some material error, not of their own making, resulted in the nonselection by the original promotion board can request reconsideration by a SSB. The statutory authority of the Secretary of the Army (SECARMY) to convene a SSB, however, is limited to only two circumstances. The first is to consider an officer for promotion whose file failed to go before the original selection board because of an administrative error.<sup>14</sup> The second circumstance is to reconsider an officer for promotion whom the original board considered in an unfair manner.<sup>15</sup>

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13. *Weiss v. United States*, 408 F.2d 416, 419 (Ct. Cl. 1969).

14. *See* 10 U.S.C. § 628(a).

15. *See id.* § 628(b) (stating that Congress requires the unfairness to be "material." To determine whether there was a "material unfairness," the Service Secretary must decide whether the original board acted contrary to law, or involved material error of fact or material administrative error, or did not have before it some material information to consider.)

#### A. Proper Bases for a SSB Consideration or Reconsideration

You first conduct an initial client interview with LTC Leftout. Lieutenant Colonel Leftout claims that her file did not go before the promotion board even though she was in the promotion zone. During the interview you call the installation's Officer Records Office and verify that because of some administrative error at U.S. Army Human Resources Command, the original selection board did not consider LTC Leftout's file for promotion.

##### 1. *Officer Not Considered*

The DOPMA statute requires the Service Secretary to refer an officer's file to a SSB when an original promotion selection board failed to consider that officer for promotion because of some administrative error.<sup>16</sup> In LTC Leftout's situation, the original board did not consider her file, as it should have, so the SECARMY will convene a SSB to consider her for promotion to Colonel.<sup>17</sup> In accordance with Army regulation, the local Officer Records Office is responsible to notify the U.S. Total Army Personal Command (PERSCOM), (now U.S. Army Human Resources Command (HRC)) of the omission.<sup>18</sup> Additionally, the Officer Records Office

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16. *Id.* § 628(a).

17. AR 600-8-29, *supra* note 2, para. 7-2(a)(1).

18. *Id.* para. 7-10. "The U.S. Army Human Resources Command [HRC] formally activated on 2 October 2003, combining the U.S. Total Army Personnel Command [PERSCOM] and the U.S. Army Reserve Personnel Command. . . . HRC is headquartered in Alexandria, VA with an additional location in St. Louis, MO. . . ." U.S. Army Human Resources Command, *About Us*, available at <https://www.hrc.army.mil/AboutUs.asp> (last visited Nov. 19, 2003) (explaining why the Army restructured PERSCOM and that the office formerly known as PERSCOM is available at <https://www.perscomonline.army.mil/index2.asp>). Note that for the sake of clarity, the remainder of the article refers to PERSCOM, nonetheless, the activity is now designated as the U.S. Army Human Resources Command (HRC).

will prepare the SSB request for the officer.<sup>19</sup> No further legal counsel may be necessary for LTC Leftout.<sup>20</sup>

## 2. *Considered in a Manner “Materially Unfair”*

A SSB can reconsider an officer for promotion if the original board nonselected him or her because of some material unfairness.<sup>21</sup> Under the statute, a promotion board’s actions are “materially unfair,” when: (1) the board acted contrary to law; (2) the board involved material error of fact or material administrative error; or (3) the board did not have before it some material information.<sup>22</sup> Each of the three “materially unfair” situations is discussed in more detail below. The first step an officer must take to determine if his or her nonselection was caused by some material unfairness, however, is to immediately request an exact copy of the file considered by the original promotion selection board from PERSCOM.<sup>23</sup> Appendix A contains a sample request for this file.<sup>24</sup>

*You met with MAJ Correction and CPT Latoer, but they did not know why they were nonselected for promotion; so you helped them each draft a request to PERSCOM to obtain their promotion files. Once the officers received their files, they discovered possible bases for promotion reconsideration. MAJ Correction believes that an unfair evaluation by his senior rater in a previous Officer Evaluation Report (OER), that he had not previously seen, caused his nonselection. In addition, his picture and several awards are missing from his promotion file. CPT Latoer claims his promotion file contained a letter of reprimand that is not his. Additionally, he is concerned that the last OER he received before the board met was not in his file. This latest OER was for a rating period that ended three months*

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19. *Id.* tbl. 7-1.

20. If selected for promotion by the SSB, LTC Leftout will have the same date of rank, effective date, and pay, as if the original board had recommended her for promotion. 10 U.S.C. § 628(d)(2) (2000). If the SSB does not recommend LTC Leftout for advancement, she will incur a failure of selection for promotion. AR 600-8-29, *supra* note 2, para. 7-8.

21. 10 U.S.C. § 628(b)(1).

22. *Id.*

23. AR 600-8-29, *supra* note 2, para. 7-11(e).

24. The sample memorandum includes a request for copies of all reference materials (such as the Letter of Instruction), administrative materials, and records of board votes. All that PERSCOM normally provides to the officer per the request, however, is a copy of the OMPF, board ORB, and an official photograph.

*before the cut-off date for submissions to the promotion board. Your mission is to determine if either aggrieved officer has a chance at a re-look.*

### 3. Board Acted Contrary to Law

Neither the statute nor the implementing regulations address with any detail this specific basis for promotion reconsideration.<sup>25</sup> Presumably, due to the secret nature of the process,<sup>26</sup> it would be difficult to determine whether a promotion selection board acted contrary to law. Two types of situations, however, have come up in practice: improper composition of promotion board members<sup>27</sup> and standing procedures that violates an officer's constitutional rights.<sup>28</sup> Upon a showing by the aggrieved officer that the board acted contrary to law, the nature of the material error determines whether the Service Secretary will refer the case to a SSB.<sup>29</sup> In CPT Latoer's scenario, the promotion board considered some other officer's letter of reprimand. Consequently, CPT Latoer could argue that the SECARMY did not follow proper records management regulations when this letter of reprimand was misfiled in his promotion file. Therefore, he may assert that the board acted contrary to law when it improperly considered the letter of reprimand. Additionally, as discussed below, CPT Latoer could claim that the board's consideration of the letter of reprimand

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25. *But see* Porter v. United States, 163 F.3d 1304, 1324 (Fed. Cir. 1998), *cert. denied*, 120 S. Ct. 41 (1999) (indicating that the Service Secretary must refer a file to a SSB upon a showing that the original board acted contrary to law).

26. AR 600-8-29, *supra* note 2, para. 1-32(c)(3).

27. The Service Secretary shall compose promotion boards in accordance with 10 U.S.C. § 612 and applicable regulations. 10 U.S.C. § 573(a) (2000). *See* Captain L. Neal Ellis, *Judicial Review of Promotions in the Military*, 98 MIL. L. REV. 129 (Fall 1982) (examining judicial review of military promotion decisions and specifically addressing defects in selection board procedures); *see also* AR 600-8-29, *supra* note 2, para. 1-31 (prescribing proper member composition of selection boards).

28. An example of this basis is the lawsuit filed a few years ago by two Judge Advocate General's Corps Lieutenant Colonels, who were passed over for promotion to Colonel, claiming the equal opportunity instructions provided to the promotion selection board violated their equal protection and due process rights under the Fifth Amendment to the Constitution. As part of a settlement, the SECARMY convened a SSB to reconsider the officers for promotion. *See* U.S. CONST. art. V; Adversity.Net, For Victims of Reverse Discrimination, *Older Military Reverse Discrimination News*, at [http://www.adversity.net/military\\_older\\_news.htm](http://www.adversity.net/military_older_news.htm) (last visited Dec. 15, 2002) (providing numerous articles on this lawsuit and others of a similar nature).

29. Presumably, a board may act contrary to law but still not materially effect the aggrieved officer's promotion nonselection. AR 600-8-29, *supra* note 2, para. 7-2(a)(2) (providing that referral to a SSB is discretionary in this situation).



involved a material error of fact in that he has never received a letter of reprimand.

#### 4. *Board Involved Material Error of Fact*

An error is considered material if it might have affected the outcome of a selection board decision.<sup>30</sup> A request for a SSB using this basis must assert that the original board considered an officer's file, which contained a "material error." An officer who believes an error of fact caused their nonselection should request that a corrected record go before a SSB.<sup>31</sup> In addition to the "board action contrary to law" basis discussed above,<sup>32</sup> the inclusion of someone else's letter of reprimand in CPT Lateoer's promotion file constitutes a material error of fact that should entitle him to reconsideration by a SSB. In contrast, MAJ Correction could seek promotion reconsideration because of the alleged faulty senior rater evaluation in a previous OER. MAJ Correction's request for promotion reconsideration, however, would be part of an OER appeal.

#### 5. *Board Did Not Consider Material Information*

Additionally, the absence of material information from an officer's promotion file may justify a request for reconsideration.<sup>33</sup> In CPT Lateoer's situation, his latest OER was missing from his promotion file. Army Regulation 600-8-29 requires that "late" OERs go before the board,<sup>34</sup> therefore, a late OER that was not considered by the original promotion board

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30. See *Porter*, 163 F.3d at 1324.

31. AR 600-8-29, *supra* note 2, para. 7-2(a)(2). Examples of other errors of fact that are potentially material include "one of more evaluation reports seen by a board [that] were subsequently materially altered . . . from the officer's OMPF" and incorrectly depicted military or civilian education level in the individual's record. PERSCOM Information Paper, *Army Officer Special Selection Boards for Promotion Reconsideration* (January 2002), available at <https://www.perscom.army.mil/select/InfoRec.htm> (last visited Dec. 15, 2002) (providing information concerning request for reconsideration by a SSB).

32. U.S. DEP'T OF ARMY, REG. 623-105, OFFICER EVALUATION REPORT SYSTEM ch. 6 (1 Oct. 1997) [hereinafter AR 623-105] (governing OER Appeals; discussed further *infra* at note 52).

33. AR 600-8-29, *supra* note 2, para. 7-2(a)(3).

34. *Id.* para. 1-33(d)(2) (stating that an OER is considered "late" when it has a "thru" date more than sixty days earlier than the due date established in the selection board notice and is received at PERSCOM before the promotion selection board has completed its final, formal vote).

is arguably “material information.” If CPT Latoer’s OER is in fact late,<sup>35</sup> the SECARMY should convene a SSB to reconsider him for promotion. On the other hand, if the awards allegedly missing from MAJ Correction’s file are lower in precedence than the Silver Star, the regulation presumes the error to not be material and the omission is not a recognized basis for a re-look.<sup>36</sup> Likewise, the SECARMY will not grant reconsideration based solely on the promotion board’s failure to see an official photograph.<sup>37</sup> These types of omissions are *not* considered material because it is presumed that an officer could have discovered and corrected the errors had he or she properly managed or reviewed his or her personnel file prior to the convening of the original promotion board.<sup>38</sup>

## B. Other Re-look Considerations

### 1. Proper Management of Personnel File

Each individual officer is responsible for managing his or her own personnel file.<sup>39</sup> This means exercising reasonable diligence in discovering and correcting any errors in the Officer Record Brief (ORB) or Official Military Personnel File (OMPF) before the promotion selection board convenes.<sup>40</sup> In MAJ Correction’s scenario, he probably did not exercise reasonable diligence in managing his own file. A SSB will not reconsider any file of an “officer who might, by maintaining reasonably careful records, have discovered and taken steps to correct an error or omission on which the original board based its decision against promotion.”<sup>41</sup> Again, an error or omission must be material to be the basis for a SSB.<sup>42</sup> Therefore, if the

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35. To verify whether PERSCOM received a missing OER before the selection board adjourned, contact the OER Branch at PERSCOM at (703) 325-4202 or DSN at 221-4202/1703 or e-mail at [tapcmser@hoffman.army.mil](mailto:tapcmser@hoffman.army.mil).

36. AR 600-8-29, *supra* note 2, para. 7-3(c).

37. *Id.* para. 7-3(e).

38. *Id.* para. 7-3(b).

39. *Id.* para. 7-3(b).

40. *Id.*

41. DOD DIR. 1320.11, *supra* note 4, para. 4.3; *see* AR 600-8-29, *supra* note 2, para. 7-3(b) (reaffirming the officer’s responsibility).

42. AR 600-8-29, *supra* note 2, para. 7-2(a)(2); *see* DCSPER SOP, *supra* note 12, para. 6-4(b)(2)(b) (explaining that a material error is defined as being of such a nature that in the judgement of the reviewing official (or body), had it been corrected at the time the individual was considered by the board the failed to recommend him/her for promotion, there is a reasonable chance that the individual would have been recommended for promotion).

officer could have discovered and corrected the error before the promotion board convened, it is immaterial.<sup>43</sup>

The promotion regulation also provides several specific examples of cases that the SECARMY will not send before a SSB.<sup>44</sup> Reconsideration will not be granted solely because “letters of appreciation, commendation, or other commendatory data for awards below the Silver Star are missing from the officer’s [OMPF].”<sup>45</sup> Likewise, a SSB will not reconsider an officer’s file solely because the original board “did not see an official photograph;”<sup>46</sup> neither will a SSB consider correspondence to the board president delivered after the cutoff date for the submission of such correspondence.<sup>47</sup> Consequently, it is the officer’s responsibility to notify the board, in writing, of possible administrative deficiencies in the ORB or OMPF before the board convenes.<sup>48</sup> Moreover, since an officer may have to exhaust administrative remedies to correct any error in the promotion file before requesting promotion reconsideration, a discussion of such is warranted.

## 2. *Exhaustion of Administrative Remedies*

Some re-look scenarios, such as LTC Leftout’s and CPT Latoer’s, do not require exhaustion of any administrative remedies.<sup>49</sup> Other situations, such as MAJ Correction’s, require officers to use other available processes and exhaust all administrative remedies before a SSB can reconsider their

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43. AR 600-8-29, *supra* note 2, para. 7-3(b).

44. *See id.* para. 7-3 (providing the complete list of case types a SSB will not reconsider).

45. *Id.* para. 7-3(c).

46. *Id.* para. 7-3(e).

47. The board’s announcement message establishes the cutoff date. *Id.* para. 7-3(f).

48. *Id.* para. 7-3(b).

49. *Id.* ch. 7. Officers whose files did not go before a promotion selection board because of an administrative error should immediately request consideration by a SSB directly with PERSCOM. Also, officers who had missing or incorrect information in their promotion file that went before the original board should request reconsideration by a SSB directly from PERSCOM. Likewise, officers who believe that the promotion selection board acted contrary to law or made a material error should also request reconsideration by a SSB directly from PERSCOM. Such officers do not have to exhaust other administrative remedies before requesting reconsideration by a SSB.

promotion.<sup>50</sup> Since MAJ Correction believes an adverse OER caused his nonselection for promotion, he must appeal his OER first, but can request promotion reconsideration as part of that appeal.<sup>51</sup> Similarly, officers seeking to have adverse information such as Article 15s, Letters of Reprimand, or the like, removed from their files must first seek relief from the Army Board for the Correction of Military Records (ABCMR).<sup>52</sup> Nonetheless, sometimes officers skip the administrative process all together, to include a request for a SSB, and attempt to sue the Army in federal court over their nonselection for promotion.<sup>53</sup>

### 3. *Is There a Judicial Shortcut to a Re-look?*

After informing MAJ Correction that the SECARMY will most likely presume he failed to manage his personnel file, and assuming that his OER appeal and request for promotion reconsideration will fail, he inquires about a possible lawsuit.

Many courts consider requests for retroactive promotion to fall squarely within the realm of nonjusticiable military personnel decisions.<sup>54</sup> Consequently, courts will avoid rendering military personnel promotion decisions.<sup>55</sup> Because of this reluctance, it is doubtful a complaint filed by MAJ Correction would survive summary judgement. Furthermore, courts, just like a Service Secretary, will not review cases involving the issue of officer promotions unless the plaintiff has exhausted all administrative remedies and asserted legal error.<sup>56</sup> Simply put, some type of request for

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50. Although not specifically set out by regulation, the contention that officers exhaust administrative remedies is the rule. The Secretary will not convene a SSB for an administrative error that the officer could have discovered and corrected before the promotion board. *Id.* para. 7-3. Additionally, any error must also be material. An error in an OER is considered material only if successfully challenged in the OER appeals process. Otherwise, the error is harmless and thus immaterial. Consequently, an officer must first attempt to have some material errors corrected before requesting a SSB, or risk having the request denied.

51. AR 623-105, *supra* note 32, governs OER appeals. A SSB may result directly from the OER appeal process. An Officer Special Review Board (OSRB) adjudicates OER appeals based upon a claim of inaccuracy or injustice that cannot be resolved between the officer and chain-of-command. *Id.* para. 6-6(i). The OSRB may, in turn, recommend that the Secretary convene a SSB to reconsider an officer's file that went before the original promotion selection board with an erroneous or unjust OER. *Id.* para. 6-6(j). Additionally, the government's denial of an OER appeal, which must be appealed to the ABCMR, could lead directly to the convening of a SSB. Specifically, the ABCMR, if it grants the appeal, may recommend the officer's file go directly before a SSB for promotion reconsideration.

reconsideration by a SSB is required before any type of re-look. There is no judicial shortcut.

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52. U.S. DEP'T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (29 Feb. 2000) [hereinafter AR 15-185]. If adverse information in the promotion file caused the nonselection, an officer may have to exhaust any ABCMR remedy. The ABCMR appeals are governed by statute (10 U.S.C. § 1552 (2000)) and regulation (U.S. DEP'T OF DEFENSE, DIR. 1336.6, CORRECTION OF MILITARY RECORDS (Dec. 28, 1994)). The statute that created and empowers this civilian board to correct military records does not limit the kind of military record subject to correction. *Porter v. United States*, 163 F.3d 1304, 1311 (Fed. Cir. 1998), *cert. denied*, 120 S. Ct. 41 (1999). Consequently, the ABCMR may entertain an application to amend a nonselection decision by a promotion board. *Id.* If it appears to the Board that reconsideration may be appropriate, it may refer a case directly to a SSB for an advisory opinion or it may recommend that the Secretary convene a SSB for a binding selection decision. *See supra* note 8 and accompanying text. If the error in the promotion file is material, the ABCMR can recommend that the Secretary refer the "fixed" file to a SSB for promotion reconsideration as part of its grant of relief. The ABCMR does not have unilateral authority to grant a retroactive promotion based upon nonselection if the promotion requires Senate confirmation. AR 15-185, *infra*, para. 2-13. Before DOPMA, the ABCMR had to conduct a harmless error test before recommending that the Secretary grant a retroactive promotion due to some "material error." *See supra* note 9 and accompanying text. The ABCMR accomplished this test by referring promotion nonselection cases to STABS. The STAB would decide whether the original selection board would have promoted the officer if it had the corrected record before it. Now, the ABCMR can use a SSB in the same way. The ABCMR can refer a particular case to a SSB for an advisory opinion of whether the officer would have been promoted by the original board "but for" the adverse information in the file. That is, to determine whether inclusion of the adverse information was a "material" error.

The rationale behind civilian corrections boards referring cases to a SSB is that military personnel applying the appropriate selection criteria make better promotion decisions. *Porter*, 163 F.3d at 1309. If the SSB, however, determines that nonselection is appropriate, the ABCMR "stands ready to receive and decide any complaints [the] officer may assert concerning the process and decision of [that] SSB." *Porter*, 163 F.3d at 1321. On the other hand, if the SSB decides in favor of the officer, that decision binds the Secretary, and ABCMR will make the necessary corrections to the officer's record and order any back-pay due. *Id.* at 1322.

53. *See Ellis, supra* note 27 (examining a myriad of judicial military promotion decisions).

54. *Kreis v. Sec'y of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989); *see Voge v. United States*, 844 F.2d 776 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 941 (1988) (holding that claims for special professional pay and retroactive promotion are nonjusticiable).

### III. The SSB Request

After you inform CPT Latoer that he has two potentially viable bases for a re-look, he wants you to help him get the SSB process started.

#### A. Drafting a Proper Request

An aggrieved officer must affirmatively and properly request consideration or reconsideration by a SSB from the appropriate authority.<sup>57</sup>

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55. The reluctance of courts to hear promotion cases is firmly rooted in the long-standing command from the Supreme Court:

Judges are not given the task of running the Army. . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters . . . .

Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953). Also, the Court of Claims specifically has recognized the impropriety of courts intruding into military promotion decisions:

The reluctance of the judiciary to review promotion actions of selection boards is rooted not only in the court's incurable lack of knowledge of the total grist which the boards sift, but also in a preference not to meddle with the internal workings of the military. . . The promotion of an officer in the military service is a highly specialized function involving military requirements of the service and the qualifications of the officer in comparison with his contemporaries, plus expertise and judgment possessed only by the military. No court is in a position to resolve and pass upon the highly complicated questions and problems involved in the promotion procedure, which includes, but is not limited to, an analysis of the fitness reports and personnel files and qualifications of all the officers considered. . .

Brenner v. United States, 202 Ct. Cl. 678, 692, 693-94 (1973), *cert. denied*, 419 U.S. 831 (1974).

56. See *Arens v. United States*, 969 F.2d 1034 (Fed. Cir. 1992) (recognizing that the judiciary should not interfere with legitimate Army matters unless the court is correcting an error of law).

57. The Service Secretary, however, has the unilateral authority to convene a SSB. This included using SSBs for Reserve or National Guard officers prior to ROPMA. See *Dowds, et. al. v. Bush, et. al.*, 792 F. Supp. 1289 (D. D.C.1992). Notwithstanding, the Service Secretary cannot unilaterally recommend an officer for promotion without consideration by a selection board of some type. *Finkelstein v. United States*, 29 Fed. Cl. 611, 627 (Fed. Cl. 1993).

There is no specific format or detailed requirements for this request.<sup>58</sup> A properly drafted memorandum, however, is critical for success. Appendix B provides a sample request using CPT Latoer's scenario.

## B. Approval or Denial of the Request

### 1. Consideration Cases

The Commander, PERSCOM, as the delagee of the SECARMY, has authority to direct that a SSB be convened when an administrative error resulted in a failure of the original selection board to consider an individual officer when eligible.<sup>59</sup> Again, referral to a SSB is mandatory in this situation.<sup>60</sup>

### 2. Reconsideration Cases

The Officer Promotions Branch at PERSCOM has authority delegated by the SECARMY to deny an officer's request for a SSB that does not comply with the requirements of Army Regulation 600-8-29.<sup>61</sup> Furthermore, the SECARMY has delegated authority to grant requests for reconsideration to the Deputy Chief of Staff for Personnel (DCSPER) Officer Special Review Board (OSRB).<sup>62</sup> Consequently, if PERSCOM does not deny a request, the SECRETARY will refer it to an OSRB.<sup>63</sup> The OSRB makes the "subjective determination as to whether error in the pro-

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58. AR 600-8-29, *supra* note 2, para. 7-11. *See id.* tbls. 7-1, 7-2 (listing information required in the request).

59. DCSPER SOP, *supra* note 12, para. 6-4(a).

60. 10 U.S.C. § 628(a).

61. AR 600-8-29, *supra* note 2. For chaplains, judge advocates, and Army medical officers, PERSCOM sends the case to the chief of the applicable special branch for a recommendation before disapproving the case for reconsideration. If the special branch and PERSCOM do not concur in the disposition of a case, it will be sent to DCSPER OSRB for a final determination. DCSPER SOP, *supra* note 12, para. 6-4(b)(2)(a)(1).

The Commander, PERSCOM, has sole authority to refer RC cases to a SSB. *Id.* para. 6-4(b)(2)(a)(2). Reserve Component cases may also be referred to a SSB by an OSRB following favorable action on OER appeals. *See* AR 623-105, *supra* note 32, para. 6-6(i).

62. *Id.* para. 6-4(b)(2)(a)(1).

63. PERSCOM may make a recommendation as to the disposition of the case. *Id.* para. 6-4(b)(2)(a)(1).

motion file was material to the officer's nonselection for promotion."<sup>64</sup> If the OSRB determines that a SSB should reconsider an officer's file for promotion, the SECARMY must convene a SSB.<sup>65</sup>

### 3. Denial of a Request for a SSB

There is no provision in Army Regulation 600-8-29 for an appeal of a denial of a request for a SSB. A denial by the SECARMY's designee of a request for a re-look, however, is arguably a "final decision" that an officer can challenge in federal court under the Administrative Procedures Act.<sup>66</sup> The standard of review under the Administrative Procedures Act is whether the SECARMY acted arbitrarily or capriciously when denying the request.<sup>67</sup> Consequently, as long as the SECARMY, or his designee, followed proper administrative procedures and documented such, a successful lawsuit would be difficult for the aggrieved officer.

## IV. The SSB Process

*Several months have passed since CPT Latoer submitted the SSB request you drafted for him. Finally, he calls with information that PERSCOM has approved the request. CPT Latoer wants you to explain the SSB procedure.*

To fully comprehend the operational details of a SSB, the practitioner must also understand the Army's officer promotion system. Therefore, the following discussion of the SSB process explains the original selection board process.

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64. *Id.* para. 6-4(b)(2)(b). A material error is defined as "being of such a nature that in the judgement of the reviewing official (or body), had it been corrected at the time the individual was considered by the [original] board . . . there is a reasonable chance that the individual would have been recommended for promotion." *Id.*

65. AR 600-8-29, *supra* note 2, para. 7-5(a). The determination by the OSRB that a SSB should be convened "does not signify a final conclusion by the Army that the action of the original board in not recommending the individual was incorrect, and it does not void the action of the original board." DCSPER SOP, *supra* note 12, para. 6-4(b)(2)(b).

66. 5 U.S.C. § 701 (2000).

67. *Id.* § 706.



### A. Convening a Promotion Board

The Army's promotion system selects and advances officers from the grade of captain to major general. The system is based upon statutes but is implemented by regulation.<sup>68</sup> In the first step of the process, the SECARMY determines whether there is a need for additional officers in a certain grade.<sup>69</sup> Then, depending upon the maximum number of officers needed at the next grade, the SECARMY establishes a promotion zone.<sup>70</sup> Thereafter, the SECARMY identifies all officers whose dates of rank place them within that promotion zone.<sup>71</sup> The mission of the selection board is to recommend for promotion the "best qualified" officers from all officers considered to be "fully qualified" for advancement to the next higher grade.<sup>72</sup> If the promotion board makes a material error during this process, the SECARMY may convene a SSB to reconsider the nonselected officer for promotion.

### B. Convening a SSB

After the SECARMY, or his designee, approves a request for consideration or reconsideration, the Department of Defense (DoD) directive requires him to convene a SSB within 180 days.<sup>73</sup> In turn, the Army regulation recommends convening a SSB within 120 days after an officer's

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68. See 10 U.S.C. §§ 611-632; U.S. DEP'T OF DEFENSE, DIR. 1320.12, COMMISSIONED OFFICER PROMOTION PROGRAM (Oct. 30, 1996) [hereinafter DOD DIR. 1320.12]; AR 600-8-29, *supra* note 2; see also Captain Holly O. Cook, *Affirmative Action: Should the Army Mend It or End It?*, 151 MIL. L. REV. 113, 140-45 (Winter 1996) (providing a comprehensive overview of the officer promotion system in the Army).

69. 10 U.S.C. § 611(a); DOD DIR. 1320.12, *supra* note 68, para. 4.3.3; AR 600-8-29, *supra* note 2, para. 1-30, glossary (listing Army competitive categories in the glossary).

70. 10 U.S.C. § 623.

71. *Id.* § 645; AR 600-8-29, *supra* note 2, para. 1-10. There are actually three promotion zones - above, in, and below the zone. Each promotion zone is defined in AR 600-8-29, *supra* note 2, glossary, sec. II.

72. 10 U.S.C. § 616; "Best qualified" is determined from the numerical constraints set by the Service Secretary while AR 600-8-29, *supra* note 2, para. 1-35(a)(3), defines a "fully qualified" officer as one of demonstrated integrity, who has shown that he or she is qualified professionally and morally to perform the duties expected of an officer in the next higher grade.

73. DOD DIR. 1320.11, *supra* note 4, para. 4.4 (barring extenuating circumstances, such as a heavy caseload, a SSB "shall be convened and the results made known to the officer concerned, within 180 days of the finding of the Secretary . . . that an error warranted consideration by [a SSB].").

case is approved for consideration.<sup>74</sup> Presumably, this sixty-day differential is to enable completion of the entire process within the 180 days specified by the DoD directive.<sup>75</sup> Furthermore, an officer being considered (but, not reconsidered) by a SSB will be notified by PERSCOM “at least thirty days before the board convenes.”<sup>76</sup> The procedures the SSB will follow are similar to those of the original promotion selection board.

### C. Standing Promotion Board Procedures

A promotion board consists of five or more officers in the grade of lieutenant colonel and higher; but in all cases the officers on the board will be higher in grade than the officers under consideration.<sup>77</sup> Before considering officers’ files, the promotion board members swears an oath to follow detailed written instructions.<sup>78</sup> These instructions guide the board members through the process of scoring individual officer files, upon which the board makes the ultimate decision to recommend certain officers for promotion.<sup>79</sup>

After scoring all files, the board rank-orders them from the highest to the lowest score on an Order of Merit List (OML).<sup>80</sup> From this list, the board must identify those “officers who are fully qualified and who are not

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74. AR 600-8-29, *supra* note 2, para. 7-5(a).

75. DOD DIR. 1320.11, *supra* note 4, para. 4.4.

76. AR 600-8-29, *supra* note 2, para. 7-4(a). The officer, however, is not offered an opportunity to communicate with the board president. *Id.* para. 7-11(d).

77. See 10 U.S.C. § 612(a)(1); AR 600-8-29, *supra* note 2, para. 1-31.

78. AR 600-8-29, *supra* note 2, para. 1-33.

79. Cook, *supra* note 68, at 141 n.17.

Board members use “blind vote sheets” to vote officer files during promotion boards. This means that each member writes the score for each file on a voting card that has removable slips. After writing the score, the member tears off the slip with the score written on it. A master voting card is attached to the back of the removable slips and carbon paper ensures that an imprint of each score remains with the file. As files pass between board members, no one can see how the other members voted a particular file. There also is no discussion between the board members during the voting process.

*Id.*

80. *Id.* at 142. See U.S. DEP’T OF ARMY, MEMO 600-2, POLICIES AND PROCEDURES FOR ACTIVE COMPONENT OFFICER SELECTION BOARDS para. A-7a(2) (24 Sept. 1999) [hereinafter DA MEMO 600-2].

fully qualified for promotion.”<sup>81</sup> Consequently, the board must determine by a majority vote the minimum score that represents those officers who are “fully qualified” for promotion.<sup>82</sup> The board then draws a line on the OML separating the “fully qualified” and not fully qualified scores. The board will not recommend for promotion any officer whose name falls below that line.<sup>83</sup>

Before determining which of the remaining officers are “best qualified” for promotion, the board must also review and score files of officers the SECARMY identified for possible early advancement from below the promotion zone.<sup>84</sup> Based upon the maximum and minimum number of below-the-zone selections authorized by the SECARMY,<sup>85</sup> the board tentatively selects below-the-zone officers for promotion consideration. Based upon the score previously determined to represent “fully qualified” officers, the board identifies below-the-zone officers whose scores exceed that number and integrates their names into them.<sup>86</sup> Finally, the board determines whom from the combined list it will recommend for promotion.

If the total number of officers on the OML exceeds the maximum number the SECARMY authorized for advancement,<sup>87</sup> the board can recommend for promotion only those officers who are “best qualified.”<sup>88</sup> Then, starting at the top of the OML, the board draws a new line below the officer whose name marks the maximum number authorized for promotion.<sup>89</sup> Consequently, the board considers all officers above that line as “best qualified” and recommends them for promotion.<sup>90</sup> Conversely, the

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81. *Id.* para. A-5(a); see AR 600-8-29, *supra* note 2, para. 1-35(a)(3).

82. AR 600-8-29, *supra* note 2, para. 1-35(a)(3)(b).

83. Such officers are not considered “fully qualified” for promotion. See 10 U.S.C. § 616(c) (2000).

84. DA MEMO 600-2, *supra* note 80, para. A-7b.

85. AR 600-8-29, *supra* note 2, para. 1-34(e) (stating that the number of officers recommended for promotion below the promotion zone may not exceed ten percent of the total number recommended for promotion, unless the Secretary increases the percentage to not more than fifteen percent).

86. Cook, *supra* note 68, at 142 (citing DA MEMO 600-2, *supra* note 80, para. A-8b(5)). Presumably, those officers tentatively selected for below-the-zone promotion are considered “fully qualified” for promotion, but may not be recommended for promotion if they fall below the cut-off line for “best qualified.”

87. 10 U.S.C. § 622 (2000).

88. AR 600-8-29, *supra* note 2, para. 1-35(a)(3).

89. Cook, *supra* note 68, at 143.

90. *Id.*

board does not select for promotion officers whose names fall below that line. Before the board adjourns, it formalizes the list of officers recommended and not recommended for promotion in a selection board report.<sup>91</sup>

#### D. Standing SSB Procedures

When a SSB considers or reconsiders an officer for promotion, it must follow the memorandum of instruction (MOI) used by the original promotion selection board that considered or should have considered the officer's file.<sup>92</sup> The SECARMY has also issued another MOI<sup>93</sup> providing guidance and instruction that each SSB must follow.<sup>94</sup>

The method the SSB will use to determine whether to recommend an officer for retroactive promotion is determined by the qualification method used by the original board.<sup>95</sup> If the original promotion board used the "fully qualified" method of selection, all members of the SSB will consider each officer's record brought before it and vote either to recommend or not to recommend promotion.<sup>96</sup> The promotion recommendation of the SSB will reflect the majority opinion of the board.<sup>97</sup> The SECARMY will not provide comparison files for the SSB to consider unless the original board used the "best qualified" method of selection.<sup>98</sup> If the original promotion board used the "best qualified" method of selection, so too will the SSB.<sup>99</sup> For each SSB using the "best qualified" method, the DA Secretariat provides comparison files from the original promotion board.<sup>100</sup> Specifically, the SSB will have before it fourteen other files of officers previously considered by the original promotion board; the last seven who made the cut and were promoted and the first seven that were nonselected on the order

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91. AR 600-8-29, *supra* note 2, para. 1-35(c).

92. DCSPER SOP, *supra* note 12, para. 6-5.

93. SSB MOI, *supra* note 12.

94. If a SSB is convened to render an advisory opinion to the ABCMR, it will also conform to any instructions provided by that board. DCSPER SOP, *supra* note 12, para. 6-5.

95. *Id.* para. 6-6.

96. *Id.* para. 6-6(b).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*; see AR 600-8-29, *supra* note 2, para. 7-7 (stating that the SSB will compare the officer's corrected record against "a sampling of [records of] those officers of the same competitive category who were recommended and not recommended for promotion by the original selection board."); see also 10 U.S.C. § 628(a)(2), (b)(2) (2000).

of merit list.<sup>101</sup> To determine if the aggrieved officer is “best qualified” for promotion, each member of the SSB scores every file before it, to include the comparison files, because they do not know which officer is being reconsidered.<sup>102</sup> If the aggrieved officer’s file receives a score equal to or higher than the lowest scored comparison file of an officer previously selected for promotion by the original board, the SSB must select the aggrieved officer for retroactive promotion.<sup>103</sup> In short, the SSB will recommend the aggrieved officer for retroactive promotion if any file previously selected by the original board has the same or lower score at the SSB than does the aggrieved officer’s file. If a SSB does recommend promotion, the SECARMY must follow the same approval procedure as for an original promotion board report.<sup>104</sup>

#### E. Post-Promotion Board Administrative Processing

Each promotion board submits its report to the SECARMY, who must determine that the board acted in accordance with law and regulation.<sup>105</sup> Next, the President or his designee<sup>106</sup> must approve the selection board report before it becomes a promotion list.<sup>107</sup> If an officer on a recommended promotion list engages in misconduct or substandard performance before the SECDEF approves the report, the President, or his designee, may remove his or her name.<sup>108</sup> Finally, the Senate must confirm promotions to the grade of major and above.<sup>109</sup> After approval by the President (and Senate confirmation if required), the names of the selected officers are placed on the promotion list in order of seniority.<sup>110</sup> After exhaustion of previous promotion lists, the SECARMY promotes the recommended officers, as needed, in the order they appear on the list.<sup>111</sup>

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101. AR 600-29, *supra* note 2, para. 6-6(b)(1)(a), (b).

102. *See supra* note 79 for an explanation of the scoring process.

103. DCSPER SOP, *supra* note 12, para. 6-6(d).

104. 10 U.S.C. § 617.

105. AR 600-8-29, *supra* note 2, para. 1-11(b).

106. The President has delegated to the Secretary of Defense (SECDEF) the authority to approve promotion board results. AR 600-8-29, *supra* note 2, para. 1-11(a); *see also id.* para. 8-1 (stating that in the case of warrant officers, after approval by the Secretary).

107. 10 U.S.C. § 624 (2000).

## F. Post-SSB Processing

Title 10 U.S.C. § 628 authorizes a SSB to make promotion decisions that will bind the Service Secretary.<sup>112</sup> Post-board processing is the same as for the original promotion board.<sup>113</sup> Upon completion of the post-board processing, the SECARMY must notify in writing individuals whom a SSB recommended for promotion.<sup>114</sup> Once promoted to the next higher grade, the aggrieved officer will “have the same date of rank, the same effective date for the pay and allowances of that grade, and the same position on the active-duty list as he would have had if he had been recommended for promotion to that grade by the [original] board. . . .”<sup>115</sup> The final approval authority for all SSB board reports is the SECDEF.<sup>116</sup>

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108. 10 U.S.C. § 629(a); AR 600-8-29, *supra* note 2, para. 8-1(a). This authority has been delegated down to the SECARMY. AR 600-8-29, *supra* note 2, para. 8-1(b). After a warrant officer promotion list has been approved by the SECARMY, only the President or his designee (SECARMY) may remove a name from the list. 10 U.S.C. § 579(d). Each promotion list is continuously reviewed at Headquarters Department of the Army “to ensure that no officer is promoted where there is cause to believe that he or she is mentally, physically, morally, or professionally unqualified to perform the duties of the next higher rank.” AR 600-8-29, *supra* note 2, para. 8-2. If the SECARMY determines that removal of an officer’s name from the promotion list may be warranted, he can refer the case to a Promotion Review Board (PRB) for advice. *Id.* para. 8-1(b). Guidance for the PRB is found in 10 U.S.C. §§ 624, 629 and AR 600-8-29, *supra* note 2, ch. 8. A discussion of the PRB process is beyond the scope of this paper. What is important, however, is that an officer who is removed from a promotion list is not entitled to request a SSB. Instead, the officer continues to be eligible for promotion by his or her next regularly scheduled board. *Id.* para. 8-10 (explaining that is *not* the case if the removal constitutes a second nonselection for separation purposes under AR 600-8-24, *supra* note 2). If selected by the next promotion board, the officer may petition for the date of rank he would have had if not removed from the original promotion list. AR 600-8-29, *supra* note 2, para. 8-10.

109. 10 U.S.C. § 624(c); AR 600-8-29, *supra* note 2, para. 1-11(a). The promotions to first lieutenant and captain require no Senate confirmation.

110. 10 U.S.C. § 624(a)(1).

111. *Id.* § 624(a)(2).

112. *Porter v. United States*, 163 F.3d 1304, 1324 (Fed. Cir. 1998), *cert. denied*, 120 S. Ct. 41 (1999).

113. 10 U.S.C. § 617 (stating that SSB results are approved by the President, or his designee, and if they are field grade selections, confirmed by the Senate).

114. DCSPER SOP, *supra* note 12, para. 6-8.

115. 10 U.S.C. § 628(d)(2). This means the officer is entitled to back-pay.

116. Congress has delegated to the SECDEF authority to approve all officer promotion selection boards under 10 U.S.C. §§ 617, 618. If the officer considered by the SSB for promotion is in the RC, the case will automatically go before the ABCMR for review before going to the SECDEF for approval. DCSPER SOP, *supra* note 12, para. 6-8.

### G. Appeal of an Adverse SSB Result

The decision of a SSB not to recommend the aggrieved officer for promotion signifies that “the cited error was harmless and the recommendation of the original board remains valid.”<sup>117</sup> If, however, “an officer meets a SSB unsuccessfully and can point to a material flaw in the SSB’s procedures, arguably undermining the SSB’s nonselection judgment, he may petition the [ABCMR] to alter or void the SSB’s decision.”<sup>118</sup> On the other hand, an officer might challenge the SSB in federal court, but courts will be reluctant to hear any promotion case until the officer exhausts all administrative remedies.<sup>119</sup>

### V. Conclusion

Eventually, almost every officer will be nonselected for promotion during an Army career. Nevertheless, the nonselection may be a mistake. To secure a promotion re-look, the officer must show the original board acted contrary to law or identify some error in his or her promotion file that was considered by the promotion board. If an error in the promotion file is material, i.e., caused the nonselection for promotion, a re-look may be justified. The officer, however, must first exhaust any applicable administrative remedy to correct the error. Thereafter, or in conjunction with the correction, the officer should request the SECARMY to convene a SSB to reconsider him or her for promotion. A judge advocate can play an impor-

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117. *Id.* para. 6-4(b)(2).

118. *Porter v. United States*, 163 F.3d 1304, 1325 (Fed. Cir. 1998), *cert. denied*, 120 S. Ct. 41 (1999).

119. If a court heard a SSB case, the focus would be whether the “SSB has achieved its statutory function of producing a reasonable determination of the officer’s original promotion prospects.” *Id.* Additionally, the practitioner should note that the DoD attempted in 2000, unsuccessfully, to have Congress pass legislation that would completely prevent judicial review of adverse SSB decisions. *See* S. REP. NO. 106-292, at 295. Although passed by the Senate in its version of the Defense Authorization Act for Fiscal 2001 (S.2549, 106th Cong. (2000)), the House’s version (H.R. 4205, 106th Cong. (2000)) did not include this provision. In conference, the language was removed from the bill (H.R. CONF. REP. NO. 106-945, at 799 (2000)) and thus was not part of the Act signed by the President (The National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, 114 Stat. 1654 (2000)). The most interesting aspect of this legislation is that it proposes the exact language already contained in the SSB statute for the RC that was passed back in 1994. ROPMA, Pub. L. No. 103-337, div. A, tit. XVI, subsect. A, pt. I, 1611, 108 Stat. 2947 (1994) (codified as amended at 10 U.S.C. § 14502)). Practically speaking, the federal courts are reluctant to intrude into the promotion decision process anyway and the remedies as limited by the proposed legislation basically codify the case law in this area.

tant role in assisting an officer in obtaining a re-look. To counsel such an officer properly, the practitioner must review several sources, including the statute that establishes the re-look process, the directive and regulation that implement the statute, and the SOP of the SSB.



**Appendix A****Sample Memorandum for Requesting Promotion Board File**

OFFICE SYMBOL

DATE

MEMORANDUM FOR Commander, U.S. Total Army Personnel Command, Attn: TAPC-MSP-O, 200 Stovall Street, Alexandria, VA 22060

SUBJECT: Request Board File for (NAME), (SSN)

1. I was not selected for promotion to (RANK), (BRANCH), by the selection board that met in (MONTH, YEAR).
2. I request a copy of all releasable materials pertaining to me that were presented to or considered by the board. This includes, but is not limited to, copies of my OMPF, Board ORB, and official photograph, as well as copies of all reference materials (such as the Letter of Instruction), administrative materials, and records of board votes.
3. Please send these materials to me at the address below at your earliest convenience.

ADDRESS

ADDRESS

4. Thank you for assisting me with this matter. Please feel free to call me at (PHONE NUMBER) if you have any questions.

NAME

RANK, BRANCH

SSN

**Appendix B****Sample Request for Reconsideration by a SSB**

ATFS--MC-1

30 November 2003

MEMORANDUM THRU

Commander, Medical Company, Medical Brigade, Fort Swampy, Anystate  
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Commander, Medical Brigade, Fort Swampy, Anystate 00000

Commander, Hospital, Fort Swampy 00000

FOR Commander, PERSCOM, Attn: TAPC-MSP-S, 200 Stovall Street,  
Alexandria, Virginia 22332-0443

SUBJECT: Request for Promotion Reconsideration by a Special Selection Board

1. I was not selected for promotion to Major, Medical Service Corps, by the selection board that convened on 27 October 2002. I request a special selection board (SSB) to reconsider my promotion because the original selection board considered an adverse document in my file belonging to another person and did not have before it some material information. Specifically, a letter of reprimand belonging to another Captain Latoer was in my file and my last evaluation report, which arrived late to PERSCOM, was not provided to the board as required.

2. Personal information:

- a. Name: LATOER, WHERISM I.
- b. SSN: 000-00-0000
- c. BRANCH: Medical Services Corps

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3. The selection board that considered me for promotion made a material error when it considered the letter of reprimand belonging to another Captain Latoer (AR 600-8-29, paragraph 7-2(a)(2)). Additionally, paragraph 1-33(d)(2), AR 600-8-29, mandates that a “late” evaluation report (if administratively correct) will be provided to the appropriate board upon receipt at PERSCOM (provided the board has not completed its final, formal vote as specified in the MOI). This paragraph defines a late evaluation report “as any report . . . which has a “thru” date more than 60 days earlier than the due date established in the selection board notice.”

a. The letter of reprimand. The local Officer Records Branch has verified that the letter of reprimand contained in my promotion file belongs to another Captain Latoer and it was not reflected in the copy of the OMPF I requested and reviewed in preparation of the original selection board. As such, I could not have discovered and corrected this error before the board convened. The inclusion of the letter of reprimand in my promotion file is a material error because it is of such a nature that had it not been included in the file, there is a reasonable chance that I would have been recommended for promotion.

b. Late OER. The last OER I received before the convene date of the board (which is enclosed), has a “thru” date of 20 July 2002. The due date established in the selection board notice for the FY01 AMEDD Major Promotion Selection Board was 20 October 2002, which is more than 60 days after the “thru” date. PERSCOM received and date stamped the report on 26 October 2002 (confirmed by OER Branch, PERSCOM), one day before the board even convened on 27 October 2002. The later OER was administratively correct and not provided to the selection board as required by Army Regulation. There is no way I could have discovered and corrected the error that my OER was not provided to the board. I last saw my OER on 24 August 2002 at which time I obtained a copy. This was two months before the board cut-off date. My PSB knew my file was not going before the October selection board and assured me the OER would reach PERSCOM before the cut-off date.

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4. I request that you convene a SSB to reconsider my entire file as it should have correctly appeared before the original board. If you have any questions, you can contact me at (000) 000-000.

Encls  
as

NAME  
CPT, MS  
000-00-0000

### Appendix C

#### Points of Contact and Websites

– **United States Total Army Personnel Command (PERSCOM)** – Promotions Branch, Reconsideration and Omissions. Ms. Rita Fisher is the POC for reconsideration and omissions and is available at (703) 325-4007 or DSN at 221-4007. The United States Total Army Personnel Command Homepage provides other Promotions Branch POCs at <https://www.perscom.army.mil/select/pocs.htm> (last visited Dec 15, 2002). “The U.S. Army Human Resources Command [HRC] formally activated on 2 October 2003, combining the U.S. Total Army Personnel Command [PERSCOM] and the U.S. Army Reserve Personnel Command. . . .” U.S. Army Human Resources Command, *About Us*, available at <https://www.hrc.army.mil/AboutUs.asp> (last visited Nov. 19, 2003) (explaining why the Army restructured PERSCOM and that the office formerly known as PERSCOM is available at <https://www.perscomonline.army.mil/index2.asp>).

– **Office of the Judge Advocate General** – Administrative Law Division, Personnel Law Branch. **Military attorneys only** with legal questions related to the promotion process can contact the judge advocate within the Personnel Law Branch at OTJAG tasked with responsibility in this area at (703) 588-6752 or DSN at 425-6752.