

Report of Recent Membership Action Review Board Cases

CAPR 35-8 requires that all decisions of the Membership Action Review Board be published. Listed below is a report of the actions completed by the MARB since 1 May 2007:

a. On 3 January 2007, Major Gilbert Day, Arizona Wing, appealed his demotion to the grade of major alleging that the action was motivated by retaliation, reached without due process, or involved a material failure to follow applicable CAP regulations. Col Ernest Bourgeois, then Commander, Arizona Wing, initiated a request for demotion to the grade of lieutenant colonel based on then Col Day's behavior during a Wing safety stand down meeting that he believed was unbecoming a CAP member and insubordinate. The request was approved by Col Tom Todd, Commander, Southwest Region with the National Executive Committee approving a demotion to the grade of major on 3 November 2006. The MARB ruled the demotion action was a violation of due process since the action taken exceeded the recommendation and the member was reinstated to the grade of colonel on 11 June 2007.

b. On 18 April 2007, Captain Gerald Salisbury, Springfield Regional Composite Squadron, Missouri Wing, appealed his membership termination action alleging the action was based on a material failure to follow applicable CAP regulations. 1st Lt Raun L. Hamilton, Commander, Springfield Regional Composite Squadron initiated the termination action for serious or willful violations of CAP regulations or directives. Captain Salisbury appealed the termination action and Major Edward J. Leonard, Group V Commander, upheld the termination action based upon the recommendation of the appeal board. The MARB ruled the termination was not motivated by retaliation nor arbitrary or capricious and the termination action was upheld on 14 September 2007.

c. On 22 May 2007, Lt Col Virginia M. Nelson, California Wing, appealed her removal from the office of California Wing Commander and demotion to the grade of lieutenant colonel. Major General Antonio J. Pineda, National Commander, initiated the adverse actions based upon poor duty performance. Lt Col Nelson withdrew her request to be reinstated as wing commander and only the demotion action was considered by the MARB. The MARB ruled that the demotion was not the result of retaliation or the result of a material failure to follow regulations and the demotion action was upheld on 14 September 2007.

b. On 15 October 2007 Lt Col Jesus Muniz appealed his removal as California Wing Commander and his demotion to the grade of lieutenant colonel alleging that the action was motivated by retaliation. On 10 September 2007, Colonel Ernest C. Pearson, Pacific Region Commander, removed Col Muniz from the position of wing commander based on unsatisfactory performance and requested his grade revert to lieutenant colonel. Since Col Muniz was within his one year probationary period as wing commander, on 1 August 2008, the MARB

ruled that the removal from command and reversion to the grade of lieutenant colonel were not motivated by retaliation nor arbitrary or capricious.

c. On 20 November 2007, 1st Lt Scott D. Johnson, Group III Headquarters, Minnesota Wing, appealed his membership termination stating that the action was taken in retaliation for filing safety concerns, fraud, waste & abuse and whistleblower complaints concerns with the Minnesota Wing leadership. The termination action was initiated by Lt Col Michael Moen, CAP, Commander, Group III, for conduct unbecoming a member, failure to obey rules, regulations and orders of higher authority and insubordination. Lieutenant Johnson appealed the termination action to the Minnesota Wing. The Appeal Board recommended Lieutenant Johnson's membership be terminated and Colonel Stephen G. Miller, CAP, Minnesota Wing Commander, agreed with the recommendation. On 5 June 2008 the MARB ruled the termination action was not based upon retaliation but did determine that the termination action was disproportionate to the alleged wrongful conduct measured against the gravity of such an action. The MARB reversed the termination action and Lieutenant Johnson's membership was reinstated.

d. On 17 December 2007, Captain Patrick L. Benoit, Group II, Texas Wing, appealed his demotion to the grade of captain and membership suspension of 60 days stating they were reached without due process and were retaliatory in nature as a result of his resignation as Texas Wing, Deputy Director of Operations. On 31 May 2007, then Col Reggie L. Chitwood, Commander, Southwest Region, initiated the actions based on then Major Benoit's insubordination and misconduct in accordance with his distribution of his resignation letter as Texas Wing Deputy Director of Operations. Additionally, on 1 June 2007 his emergency services qualifications were suspended until the Texas Wing commander determined and certified to the Region Commander that his attitude did not pose a safety risk for participating in CAP Emergency Services operations. Although the membership suspension was completed in August 2007, Captain Benoit's Emergency Services qualifications remained suspended on 1 November 2007 when Lt Col Owen Younger, Commander, Group II, Texas Wing, notified him that he had been unable to determine what action needed to be completed to reinstate the Emergency Services qualifications. The MARB decided to hear the case using the 1 November date as the end of all administrative/appeal actions. On 3 July 2008, the MARB determined that the demotion and membership suspension were not based upon retaliation, lack of due process or a material breach of regulations. They did, however, find that the requirement to requalify for his Emergency Services qualifications with only certain personnel was inconsistent with and unduly restrictive when compared to existing regulations. The MARB ruled that Captain Benoit was to be provided with an opportunity to requalify/recertify for the ES ratings with any qualified Emergency Services personnel at the Group or Wing level who were qualified by regulation to evaluate and certify qualifications.

f. On 8 February 2008, Mr Robert Davenport, Cloverfield Composite Squadron, California Wing, appealed his membership termination and demotion to the grade of senior member stating they were reached without due process and the result of retaliation. The membership termination action was initiated by Major Saman Seneviratne, for serious and willful violations of CAP regulations or directives; failure to obey rules, regulations and orders of a higher authority; insubordination; and conduct unbecoming a member of CAP. The action was appealed to the Los Angeles County Group 1 Commander, Lt Col Valerie G. Hanley. An appeal board was appointed and Lt Col Hanley upheld the Board's recommendation to terminate Lt Col Davenport's membership and demote him to the grade of senior member. On 22 October 2008, the MARB determined that the actions were not reached without due process or motivated by retaliation and upheld the Group Commander's decision.

g. On 22 May 2008, 1st Jeffrey Porter, Green River Composite Squadron, Washington Wing, appealed his demotion to the grade of first lieutenant as well as his removal from the position of Wing Counterdrug Officer based on a material failure to follow the regulations. The Washington Wing, Col David E. Maxwell, initiated the termination action against then Captain Porter for serious or willful violations of CAP regulations or directives. The member appealed the termination and Colonel Ernest C. Pearson, Pacific Region Commander, appointed an appeal board. The appeal board recommended his membership be retained but that the member not be reappointed as the Wing Counterdrug Officer and a reduction in grade would be appropriate. The Pacific Region Commander concurred with the Appeal Board's recommendation. On 3 July 2008, the MARB determined that removal from the position of Wing Counterdrug Officer was not a final adverse action within the jurisdiction of the MARB. In addition, the MARB found that the demotion action was not arbitrary or capricious, was not the result of retaliation or the result of a material breach of regulations and the action was upheld.

h. On 2 June 2008, Mr. David A. Alvord, formerly of the Central Fellowship Christian Academy Cadet Squadron, Georgia Wing, appealed his membership termination stating the appeal process was not conducted in accordance with CAP regulations. Mr Alvord's membership termination action was completed in August 2007. Since this appeal did not meet the requirement established in CAPR 35-8 to appeal within 60 days of the final adverse action, the MARB declined to hear the case on 3 July 2008.

i. On 18 June 2008, Maj Charles Farry, of the Thunderbolt Composite Squadron, Texas Wing, appealed his membership suspension in excess of 60 days as a material failure to follow regulations as well as retaliation and reprisal. Col Joe Smith, Texas Wing Commander, suspended Maj Farry pending an investigation in accordance with CAPR 52-10. On 19 November 2008 the MARB notified Maj Farry that it would not hear the case.

j. On 7 September 2008 Mr. Darrell Tippler, formerly of the Capitol City Composite Squadron, Louisiana Wing, appealed his membership termination stating there was a material failure to follow the regulations in regards to the appeal process. 1st Lt Suellen A. Yglesias initiated the termination action against Mr. Tippler for habitual failure to perform duty, conduct unbecoming a member of CAP, substandard performance of duty over an extended period of time and insubordination. Mr. Tippler's attempt to appeal the action was untimely under CAP regulations; however, Mr. Tippler alleged that he was covered under the Louisiana Code of Ethics for State Employees and should have been granted a different appeal period. It was determined that the Louisiana statutes and regulations cited by Mr. Tippler did not grant him rights in addition to those found in CAP regulations and the MARB declined to hear the case on 25 February 2009.

k. On 12 November 2008 Mr. William R. Breeze, formerly of the Keystone Heights Flight, Florida Wing, appealed his membership termination stating material failure to follow the regulations in regards to the appeal process. Mr. Breeze's membership termination took place in September 2005; therefore, this appeal did not meet the requirement established in CAPR 35-8 to appeal within 60 days of the final adverse action and on 15 December 2008 the MARB declined to hear the case.

l. On 9 April 2009 Lt Col Mark Lee, former Pennsylvania Wing Commander, appealed his removal from the position of Wing Commander and his demotion to the grade of lieutenant colonel alleging a material failure to follow regulations and lack of due process. Col Robert Diduch initiated the actions as the Northeast Region Commander stating poor duty performance as the reason for the actions. The MARB decided to hear the case and after reviewing all the information determined that the Northeast Region Commander did not have the authority to extend a Wing Commander's probationary period; therefore, the normal three-year term of office began in September 2008. Since performance deficiencies are grounds for removal after the probationary period, the MARB chose to consider the original extension agreement as notice of performance issues with six months to correct the deficiencies. Since the only deficiencies specifically noted involved Air Force concerns regarding record keeping and proper supervision of equipment under control of the Pennsylvania Wing, the memorandum from the Pennsylvania State Director in December 2008 stating there were no discrepancies in equipment documentation and commending the Wing was considered to be evidence that the performance deficiencies had been corrected and removal from office was not warranted. On 9 July 2009 the MARB reinstated Col Lee as the Wing Commander for the remaining two years and six months of his term and reinstated the grade of colonel.

m. On 25 June 2009 Captain Charles Farry of the Texas Wing appealed his membership suspension and demotion to the grade of captain stating that his suspension was in excess of 60 days and the demotion was reached without due

process. Col Joe Smith, Texas Wing Commander, suspended then Maj Farry on 5 March 2009 in response to a cadet protection complaint. After an investigation the Wing Commander determined that a demotion action to the grade of captain was warranted and such action was taken upon conclusion of the 60 day suspension period on 5 May 2009. The MARB could find no evidence supporting the claim that the suspension was greater than 60 days and refused to hear that part of the case. They did determine that they would consider an appeal on the limited question of whether there was sufficient information available to the Texas Wing Commander in April 2009 to justify a reduction in grade at the conclusion of the suspension. Captain Farry failed to respond to the Texas Wing Commander's response to the appeal and the MARB had no choice but to review the case with the information at hand. On 8 March 2010 the MARB determined that there was no evidence to support the claim that the demotion action was an act of retaliation or the result of a material breach of regulations or lack of due process. The demotion action stands.

n. On 19 October 2009 former 1st Lt Cheryl Piazza of the Seacoast Composite Squadron in the New Hampshire Wing, appealed her membership termination alleging it was motivated by retaliation. Major Michael Hall, Commander of the Seacoast Composite Squadron, initiated the termination action based on conduct unbecoming a member of CAP, failure to obey rules, regulations and orders of higher authority, insubordination, and continued membership was adverse to the best interest of CAP. Lieutenant Piazza appealed the termination action and Col Donald N. Davidson, New Hampshire Wing Commander, appointed an appeal board to hear the case. On 20 August 2009 Col Davidson notified Ms Piazza that the appeal board had unanimously concluded that the evidence supported the termination action and was being upheld. On 5 February 2010 the MARB notified Ms Piazza that the initial review of the appeal found the termination was not arbitrary and capricious, the result to retaliation or lack of due process and declined to hear the case.

o. On 20 November 2009 Major Carolyn Fresneda of the Osceola Cadet Squadron, Florida Wing, appealed her membership suspension and demotion alleging a material failure to follow the regulations and lack of due process. On 26 August 2009 Col Christopher S. Moersch, Florida Wing Commander, initiated an investigation concerning a cadet protection complaint against then Lt Col Fresneda. As a result of the findings of the investigation Col Moersch, suspended then Lt Col Fresneda and demoted her to the grade of major. After initial review, the MARB decided to hear the case. On 20 February 2010 Col Moersch asked the MARB to reconsider their decision based on the individual's failure to request a higher level review of the IG investigation in accordance with the procedures outlined in CAPR 123-2. During the MARB's investigation of this issue it was determined that the demotion action was completed without the approval of the region commander as required by CAPR 35-5, and the action was immediately voided. On 10 March 2010 Major Fresneda was returned to the

grade of lieutenant colonel. Since the membership suspension had been previously lifted the case is now closed.

p. On 12 February 2010 former Lt Col James L. Nova of the Arizona Wing appealed his membership termination alleging a material failure to follow the regulations and lack of due process. On 17 December 2009 then Lt Col Nova was notified that the National Commander had declared his membership null and void based on his failure to continue to meet the initial membership eligibility criteria. In reviewing the information submitted the MARB determined that Mr Nova had been convicted of a felony in federal court and failed to notify CAP of the change to the background information originally submitted on his membership application as required. Since conviction of a felony requires a waiver by the National Commander or Executive Director and the decision on eligibility is final and not subject to appeal, the MARB determined they had no jurisdiction in this matter and declined to hear the case.