ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF: XXXXXXXXXXXXXXX

DOCKET NUMBER: BC-2015-05102-4

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider his request for the following:

1. His nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ) and subsequent negative actions be void and removed from his record.

2. The promotion propriety action (PPA) removing his name from the colonel's promotion list be void and removed from his record.

3. He be promoted to the rank of colonel (O-6).

4. He be retired in the rank of colonel.

5. All leave, to include terminal leave taken, be restored and accrued leave be sold.

6. His referral officer performance reports be void and removed from his record.

7. He receive interest on the back pay to which he is entitled.

8. He receive coverage under the Servicemember's Group Life Insurance (SGLI) up until his new date of retirement.

RESUME OF THE CASE

The applicant is a retired Air Force lieutenant colonel (O-5).

The applicant received an Article 15 dated 26 Oct 11, a referral OPR for the period ending 7 Jan 12, and promotion propriety action (PPA) removing his name from the CY10 Colonel Line Central Selection Board (CSB) dated 28 Dec 11. The unfavorable personnel actions were the result of misconduct on 10 Sep 11 while attending a festival in Mons, Belgium. The misconduct included resisting apprehension by an armed forces police officer, assault and communicating threats. The applicant's misconduct was the result of overindulgence in alcohol based on eyewitness statements and written matters, to include a medical provider's memorandum. On 29 Mar 12, the Numbered Air Force commander (NAF/CC) stated he was aware the applicant was taking prescription medication but made a conscious decision to consume alcohol while on prescription medicine and therefore he was responsible for his actions. On 4 Apr 12, SAF/GCM found the evidence was given appropriate consideration and both the Article 15 and removal actions were appropriate. The applicant received a subsequent referral OPR for the period ending 7 Jan 13 for failure to maintain fitness assessment standards.

On 12 Mar 13, the applicant applied for voluntary retirement in the rank of lieutenant colonel. On 12 Nov 13, the Secretary of the Air Force determined he served satisfactorily in the rank of lieutenant colonel within the meaning of 10 U.S.C. § 1370(a)(1).

On 1 Jun 14, he retired in the rank of lieutenant colonel with a narrative reason for separation of "Voluntary Retirement: Sufficient Service for Retirement." He was credited with 23 years, 5 months, and 18 days of active duty service.

The applicant's initial AFBCMR case was assigned docket number BC-2013-00688. On 13 May 14, the Board denied the applicant's request adopting the opinions and recommendations of the Air Force offices of primary responsibility (OPR) and the AFBCMR Medical Advisor that there were no procedural errors in the processing of the NJP or PPA. On 14 Nov 14, the applicant submitted an appeal. He was not provided a copy of the AFPC/JA advisory and his rebuttal response was not considered. He requested his case be re-opened, the Board's earlier decision be expunged and his process start over with new advisory opinions issued in his case.

On 20 May 15, the Board reconsidered and denied the applicant's request. The Board found there was sufficient evidence to show alcohol was a major contributing factor. The Board also found much of the applicant's contentions were medical theories, speculation and possible reasons while ignoring alcohol was a contributing factor. The Board concluded it was more likely than not that his alcohol intake was a major contributing factor for his actions. On 21 Jun 15, the applicant protested the decision to deny his request and contended he did not receive fair consideration. He requested the record of proceedings (ROP) be expunged and his case be reconsidered.

On 14 Oct 15, the AFBCMR Executive Director informed the applicant given the errors in his case, the applicant would be provided an opportunity to reapply to a new AFBCMR panel. To preclude the possibility of any prejudice, the applicant was requested to submit a new DD Form 149, *Application for Correction of Military Record.* The case was assigned a new docket number (BC-2015-05102).

On 28 Jul 16, the applicant submitted a DD Form 149 requesting removal of the PPA. He stated this claim was separate from BC-2013-00688 and BC-2015-05102. He stated BC-2015-05102 was for removal of the Article 15 and this case was for appeal of the PPA. The AFBCMR Staff assigned BC-2016-03051. However, on 2 Aug 16, the AFBCMR determined the case was improperly created and the request was transferred and combined with BC-2015-05102. Based on the ROPs in BC-2015-05102, both his requests for appeal of the Article 15 and PPA were addressed by the Board.

In order to provide the applicant new case consideration, eight new advisory opinions were obtained and a new panel considered the applicant's case. On 1 Jun 17, the Board denied the applicant's request. The AFPC OPRs and AFLOA/JAJAM recommended denial; however, the AFBCMR Medical Advisor and Psychiatric Consultant recommended granting relief. The Board disagreed with the opinions and recommendations of the AFBCMR Medical Advisor and Psychiatric Consultant to grant his request. The Board noted the AFBCMR Medical Advisor and Psychiatric Consultant advisory opinions stated the contentions were difficult to prove or disprove and there were possible competing causes for his behavior (alcohol, undiagnosed seizure disorder, possibly precipitated by alcohol consumption). While the AFBCMR Psychiatric Consultant noted the applicant likely would not have been overly intoxicated after consuming five alcoholic drinks, there was no evidence to conclude this was the case as there was no determination to the level of intoxication. The applicant provided a rebuttal response to the advisory opinions on 8 May 17; however, it was not received by the Board until 24 Aug 17 and was not considered by the Board.

On 18 Mar 18, the applicant's case was reconsidered for the rebuttal response. The Board again denied his request. The Board found the applicant exhibited poor judgment when he chose to

combine alcohol with prescribed medication. The Board also found no corroborating evidence to substantiate his assertion AFLOA/JAJM unfairly influenced the OPRs in the writing of the advisory opinions.

On 23 Oct 19, the Court of Federal Claims (CoFC) remanded the applicant's case to the AFBCMR for reconsideration. The CoFC found the applicant's procedural challenge to the Board's decisions and challenge to the Article 15 were without merit. However, the CoFC concluded the Board failed to address the AFBCMR Psychiatric Consultant's conclusion his behavior was inconsistent with someone having five drinks over the course of a day but was consistent with a medical condition. By holding the applicant to a "clear" evidence requiring him to prove a seizure was the sole cause, the AFBCMR required him to meet a higher standard than the "more likely than not."

Per the CoFC remand Order, the Board reconsidered his case on 8 Jan 20 and denied his request. The Board noted that while all advisory opinions are given considerable weight, credibility and deference, the Board is not bound to the recommendations of any subject matter experts. While the AFBCMR Medical Advisor and Psychiatric Consultant recommended relief, the Board found their recommendations were unconvincing, uncertain and half-hearted. The advisory opinions noted the contentions were challenging to prove or disprove and that his behavior was most likely multi-factorial. While the Psychiatric Consultant noted his behavior was inconsistent with someone who had five drinks over the course of the day, there was no documentation to show how much and over what course of time he consumed alcohol. The repeated use of words such as "possible," "may have been" or "could have" were not persuasive. The Board also noted the SAF/GCM letter dated 4 Apr 12 that his WG/CC and NAF/CC considered the statement by a medical officer that the applicant's behavior "may have been" induced by medication in combination with heat, dehydration and alcohol and concluded it was the applicant's decision to consume alcohol while on medication. SAF/GCM was satisfied the evidence was considered.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letter and Record of Proceedings at Exhibit W.

On 5 Jul 22, the applicant requested reconsideration of his request. He would have prevailed in his last case ordered by the CoFC had the AFBCMR not acted outside of its scope and used the wrong standard of proof. He made the following assertions for reconsideration of his case: (1) The AFBCMR acted beyond its scope and found him guilty of something his commander ruled out. (2) The AFBCMR continues to use the wrong standard of proof. (3) He provides evidence to dispute the AFBCMR conclusion it was too hot to consume alcohol responsibly. (4) The AFBCMR improperly placed culpability on him for taking two prescription drugs when the drugs were accidentally prescribed by the medical community. (5) The AFBCMR improperly placed weight on the NAF/CC letter to the SAF/GC. (6) The AFBCMR improperly placed weight on a doctor's opinion without the benefit of knowing his official diagnosis. (7) The AFBCMR has not provided a legal opinion to address the AFBCMR not considering the medical opinions of the AFBCMR doctors. (8) The AFBCMR improperly assigned two panel members who had previously sat on Boards of his expunged appeals despite a promise from the Executive Director that this would not take place. The AFBCMR polluted the process further by providing all three panel members with a copy of the ROP from the expunged case. (9) The Board solicited an opinion from the wrong subject matter expert. (10) He still has not received a decision on his case BC-2016-03051.

The Board's rationale for denying his request keeps changing. Upon the CoFC remand, the charge morphed into him allegedly combining alcohol with prescription drugs and that it was too hot to do so safely. He was unable to introduce new evidence to refute the claim. The Board created a charge of a violation of Article 92, UCMJ his commanders did not charge him with. The Board came to an arbitrary and capricious decision by saying it was too hot to safely consume alcohol when they did not even know the temperature of the day. The AFBMCR has yet to provide a legal

opinion to look into the accounts of the AFBCMR doctors opinions stating his conduct was inconsistent with drunken behavior.

He cites BC-2001-03646 as precedent. In this case, AFLSA/JAJM was not prepared to conclude the applicant's medical condition constituted a legal excuse for the applicant's behavior. However, they agreed a reasonable commander, if presented with medical evidence at the time would have likely elected to address the behavior outside of the nonjudicial punishment forum. While there was not a clear error, AFLSA/JAJM stated if the Board concluded the evidence presented an injustice, setting aside the Article 15 action was warranted. He requests a legal opinion be formed based on the medical advisories written by the Board who knew of his seizure disorder.

The Board solicited an opinion from AFPC regarding retirement in the rank of colonel with less than three years' time in grade. The correct subject matter expert is the Colonels' Group. They can confirm that multiple individuals retired as a colonel with less than three years' time in grade.

At the time, he weighed 230 pounds and consumed alcohol over a 7 hour period. He would have had a blood alcohol content (BAC) of .02 to .03. Having had subsequent seizures, he knows the indescribable aftermath of having one. The witnessed behavior could not possibly be more indicative of a complex partial seizure. Although his case is unusual, it is easy for the Board to adjudicate. The question before the Board is whether this was caused by a medical issue or a simple overindulgence of alcohol. The Board must decide whether the statements of his appearing drunk from witnesses who saw him for a few minutes outweigh the professional opinion that he was having a medical problem.

The applicant's complete submission is at Exhibit X.

The applicant cites BC-2001-03646 as precedent to grant his request. On 6 Feb 23, the Board partially granted this applicant's request and removed his Article 15 and directed he be retired in the rank of technical sergeant (E-6), rather than staff sergeant (E-5). The Board denied the applicant's request for retirement in the rank of master sergeant (E-7). The Board noted the applicant was suffering from a cognitive disorder, post-traumatic stress disorder (PTSD) and depression at the time he was accused of misconduct and disciplined with an Article 15 for making a false statement and failure to go. The Board was persuaded the applicant's actions were the result of his medical condition and were a direct and substantial causative factor for the behavior. The Board noted there was no other way to explain the abrupt change in his behavior and sudden tendency to act in a manner contrary to his own interest. In the advisory opinion, the AFBCMR Medical Consultant noted there was no evidence at the time of his disciplinary occurrences that alcohol was ever suspected.

APPLICABLE AUTHORITY/GUIDANCE

Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records*, paragraph 2.4. The Board normally decides cases on the written evidence contained in the record. It is not an investigative body; therefore, the applicant bears the burden or providing evidence of an error or injustice.

DAFI 36-2603, paragraph 4.1, The applicant has the burden of providing sufficient evidence of material error or injustice. The Board will recommend relief only when a preponderance (more likely than not) of evidence substantiates that the applicant was a victim of an error or injustice.

AIR FORCE EVALUATION

AF/JAJI (Legal Advisor) recommends denial. There is no evidence the AFBCMR's previous determinations were erroneous, unjust, arbitrary, or capricious. The applicant's "new evidence"

is merely a disagreement with the AFBCMR's determinations and hence not new evidence of an error or injustice. As a result, AF/JAJI recommends dismissal of the present application for reconsideration. However, if the AFBCMR does elect to review the new arguments as "new evidence," AF/JAJI concludes after careful consideration the evidence fails to provide sufficient evidence of an error or injustice. AF/JAJI addresses the applicant's contention as a whole, which is that the AFBCMR committed an error. Such an allegation requires a high standard of proof and the applicant does not meet it.

Federal Courts have construed that once an applicant seeks relief from the AFBCMR, the AFBCMR's determination is binding unless the decision was arbitrary, capricious, unsupported by substantial evidence, or contrary to applicable statues and regulations. The AFBCMR's decision is also only considered arbitrary and capricious if the AFBCMR fails to consider an important aspect of the problem, offers an explanation for its decision that runs counter to the evidence, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Finally, the AFBCMR's determination is given deference so that when reviewing the decisions of the AFBCMR under the arbitrary and capricious standard, the scope of review is extremely narrow.

Per this legal standard, the AFBCMR's decision was supported by the evidence and the AFBCMR's denial could properly be ascribed to well-reasoned and thorough consideration. Second, the AFBCMR applied the correct standard of proof, preponderance of the evidence, contrary to the applicant's contention. Third, the applicant's challenges to the AFBCMR's determinations are merely a difference in view, not evidence of error. Finally, the alleged lack of a legal advisory regarding the medical opinions the AFBCMR relied on, and the fact that past legal opinions were provided prior to the medical opinions were not procedurally erroneous.

The complete advisory opinion is at Exhibit CC.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 1 May 23 for comment (Exhibit DD). In his response, the applicant states this is the fourth time this case has come before the Board. The three prior cases were expunged due to a Court Order and AFBCMR discretion. Two other 2013 appeals were expunged and he has been actively appealing his case since 2012.

At the time of his initial application, AFI 36-2603, *Air Force Board for Correction of Military Records*, stated the applicant had the burden of providing sufficient evidence of material or error or injustice but did not define sufficiency. He knows full well that preponderance of the evidence is not the standard of proof in these matters. It indeed was a major change to pancake the standard of proof all the way to preponderance of the evidence in the 2022 update of AFI 51-202, *Nonjudicial Punishment.*

The AF/JAJI advisory is not a legal opinion of the merits of the case. It is a legal opinion as to whether he met the burden of providing new relevant evidence. As it stands, no Board has provided adequate legal advice regarding the merits of his case. He asks if it is beyond comprehension as to why he cannot be afforded due process.

He took his previous case to the Court. The Court disturbed the AFBCMR decision; however, the AFBCMR then changed the rationale as to why he was given an Article 15 without an ability for him to provide contrary evidence. Unfortunately, the statute of limitations ran out and he can no longer claim this is arbitrary and capricious to the Court.

The Executive Director, in writing, promised him a new Board would be formed with new members with no access to previous decisions in order to provide him with due process. However, this did not happen as previous case members were reutilized in this iteration.

The AFBCMR Medical Advisor in his advisory stated he changed his mind from previously thinking alcohol was the cause to now a medical condition being the cause. His initial opinion should be struck from the record. That opinion was rendered in an expunged case where he was not privy to his having a seizure disorder as well as other irregularities with his case, which caused it to be thrown out. There should be no record of this opinion as it was given with incorrect information.

The case has been repeatedly reheard over the past 11 years. Yet, Air Force legal authorities say there is no reason for it to be reexamined. However, this request for reexamination has more merit than all of the others combined. At the most fundamental level, the standard of proof is wrong per AFI 51-202 and AFI 36-2603. The Board came to the opposite conclusion of the commander but arbitrarily decided he was culpable without having information regarding the prescriptions or the temperatures of the day. It is not permissible for the AFBMCR to charge appellants with new crimes, especially crimes that the commander in writing said did not happen.

The Board's Psychiatric Consultant was unequivocal his behavior was inconsistent with intoxication. His case has spanned so many Executive Directors and AFBCMR staff members that the Board is repeatedly making the same error. Only the 2013 Board found alcohol to be the cause. One Board said the alcohol caused a seizure so he was responsible. One Board said doctors were not certain of a seizure disorder at the time; however, doctors can only render a medical opinion. It was unequivocally stated his behavior was inconsistent with intoxication. That should be proof enough he was not guilty of overconsumption of alcohol. He took an extra step and provided information from the Epilepsy Foundation, which describes a typical event. If he has not made it abundantly clear he is the victim of a prolonged injustice, he requests a video hearing.

The applicant's complete response is at Exhibit EE.

FINDINGS AND CONCLUSION

1. The application was timely filed.

2. The applicant exhausted all available non-judicial relief before applying to the Board.

3. After reviewing all Exhibits, the Board remains unconvinced the evidence presented demonstrates an error or injustice. The Board concurs with the rationale and recommendation of AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant makes many assertions regarding the Board's wrongdoing in the denial of his request. The applicant asserts due to the errors by the AFBCMR, he was promised by the AFBCMR Executive Director he would be given an opportunity to reapply to a new AFBCMR panel and the decision in his case in BC-2013-01688 would be expunged. As requested, the applicant on 28 Jul 16 submitted a new DD Form 149, his case was assigned a new docket number (BC-2015-05102), eight new advisory opinions were obtained and per the AFBCMR Executive Director, his case was presented to a panel which did not include members in the denial of his request in BC-2013-00688. The panel members were also not provided any documents in his prior case BC-2013-00688. However, the AFBCMR Executive Director's pledge for a new panel did not extend to granting the applicant new panel members for any future reconsideration requests. The Board also notes the AFBCMR errors in his prior case were administrative errors pertaining to mailing issues, rather than any arbitrary or capricious actions by the AFBCMR staff or the Board. The applicant also contends the AFBCMR Medical Advisor improperly referenced his prior case in the new advisory recommending the applicant be granted relief. However, it was the

applicant in his DD Form 149 dated 28 Jul 16 who noted his prior case of BC-2013-00688 and that his case was expunged in 2015 due to errors and that he was allowed to start over and re-appeal from scratch. While the applicant desires the Board to believe his commanders, the AFBCMR staff, AFBCMR panel members and the subject matter experts providing advisory opinions in his case were prejudiced and biased against him, he has provided no evidence to sustain this to be the case. As pointed out by AF/JAJI, the applicant's arguments are merely a disagreement with the Board's decision and he has not sustained his burden of proof of any error or injustice. Furthermore, military administrators and commanders are presumed to act lawfully and in good faith and entitled to substantial deference in the governance of its affairs.

With regard to the applicant's contention the Board used the wrong standard of proof. The standard of proof is "more likely than not." While the applicant wants the Board to believe his misconduct was solely due to a medical condition, there is no evidence to sustain this to be the case. As noted by the medical evaluation dated 31 Oct 11, his misconduct was likely multifactorial and due to a combination of antihistamines, alcohol, dehydration and possible fatigue and heat. The applicant has failed to provide any evidence to sustain his misconduct was due to a medical condition. However, the evidence is clear he chose to consume alcohol while taking prescribed medication. Accordingly, the Board finds the evidence is sufficient to conclude alcohol consumption combined with medication and environmental factors were contributing factors. The applicant also states the AFBCMR Psychiatric Consultant unequivocally determined his misconduct was not the result of alcohol consumption; however, the Board notes the AFBCMR Psychiatric Consultant stated in the advisory the applicant's contention was difficult to prove or disprove due to the number of factors. Moreover, while the applicant provides theories on possible blood alcohol content and that he was not intoxicated, he has provided no evidence in support of his hypothesis. The AFBCMR Psychiatric Consultant also noted the applicant's arguments at large were just hypothetic scenarios, rather than evidence in support of his request.

The applicant also contends he has not received a decision in his request for removal of the PPA (BC-2016-03051); however, the applicant is fully aware that this request was administratively closed and the request for removal of the NJP and PPA were combined in BC-2015-05102 due to both unfavorable personnel actions resulting from the same misconduct on 10 Sep 11. The applicant also cites the Board in BC-2015-05102-3 charged him with a new crime when it concluded the applicant's misconduct was the result of consuming alcohol while on medication. However, the Board is not an administrative board and does not charge applicants with crimes, nor is it an investigative body. In accordance with DAFI 36-2603, the Board decides cases based on the evidence of the case. The applicant also argues the Board did not know the temperature of the day; however, attributed his misconduct to the heat. In this respect, the applicant's medical evaluation on 31 Oct 11 also referenced heat and temperatures as a factor. The applicant's prior case was reconsidered per the CoFC remand order. The CoFC reviewed the Board's decision and did not find it arbitrary or capricious. While the applicant contends, he was unable to provide additional evidence to the CoFC to refute the Board's decision due to the statute of limitations; there is no evidence he was denied an opportunity by the Board or the CoFC to provide additional evidence. It appears instead he chose to submit a request for reconsideration. The applicant's requests have been considered numerous times, to include on remand by the CoFC. Other than his own uncorroborated assertions and hypothetical theories, he has provided no evidence to sustain his burden of proof his misconduct on 10 Sep 11 was due to a medical condition and alcohol consumption was not a factor. The applicant also contends a legal advisory regarding the Board's decision to not adopt the opinions of the AFBCMR Medical Advisor or Psychiatric Consultant's recommendations to grant relief is required. However, as pointed out by AF/JAJI and as stated in the Board's previous decision, the Board is not bound to adopt the opinion of any subject matter expert but instead, on behalf of the Secretary of the Air Force, decides cases based on the evidence. The applicant also contends the AFBCMR obtained an advisory opinion from the wrong office and that the Colonels' Group rather than AFPC Retirements should have provided an opinion regarding his retirement. The Colonels' Group could have confirmed that there is precedent for

officers to retire in the rank of colonel without serving the full three years' time in grade as required. In this respect, the Board finds the applicant's assertion not relevant since the applicant was never promoted to the rank of colonel and his name was removed from the colonel's promotion list as a result of the PPA.

The applicant cites BC-2001-03646 as precedent and new evidence to grant his request. However, the Board does not find the case similar to warrant relief. The applicant in the cited case, a staff sergeant, suffered from a cognitive disorder, PTSD and depression, the Article 15 he received was for failure to go and making a false statement; and as noted by the AFBCMR Medical Advisor, there was no evidence alcohol was ever suspected. The facts in the cited cases are overwhelmingly not similar. The applicant in this case was in the rank of lieutenant colonel, his misconduct, to include assault, was attributed to alcohol consumption and he was not diagnosed with PTSD and depression at the time of the misconduct for which he received the NJP and PPA. In view of the totality of the evidence, the Board finds the applicant has not sustained his burden of proof to warrant removal of the NJP and PPA. Therefore, the Board recommends against correcting the applicant's records.

4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

RECOMMENDATION

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

CERTIFICATION

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2015-05102-4 in Executive Session on 5 May 23 and 28 Jun 23

, Panel Chair
, Panel Member
, Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit W: Record of Proceedings, w/ Exhibits A-V, dated 14 Jan 20.
Exhibit X: Application, DD Form 149, w/atchs, dated 5 Jul 22.
Exhibit Y: Documentary evidence, including relevant excerpts from official records.
Exhibit Z: Record of Proceedings, w/atchs, BC-2013-00688.
Exhibit AA: Admin Close BC-2016-03051.
Exhibit BB: Cited Case, Record of Proceedings, BC-2001-03646.
Exhibit CC: Advisory Opinion, AF/JAJI, dated 14 Apr 23.
Exhibit DD: Notification of Advisory, SAF/MRBC to Applicant, dated 1 May 23.
Exhibit EE: Applicant's Response, undated.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

X

Board Operations Manager, AFBCMR