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UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS

SECOND ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2014-02210-3

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider his request for the following:

1. Removal of the Flying Evaluation Board (FEB) from his records;

2. Amendment of his flying record to reflect an administrative withdrawal from the KC-10 Pilot Instructor Course (PIC);

3. Rescission of his disqualification from aviation service;

4. Reinstatement of his flight status; and

5. Consideration of his allegations of reprisal under Department of Defense Directive (DoDD) 7050.06, *Military Whistleblower Protection Act (MWPA),* and Title 10 United States Code, Section 1034 (10 U.S.C. § 1034), *Protected communications; prohibition of retaliatory personnel actions*.

RESUME OF THE CASE

The applicant is a retired Air Force lieutenant colonel (O-5), effective 1 Nov 20.

According to documentation provided by the applicant:

In Feb 10, the applicant received a Progress Review Board (PRB) for a third (non-consecutive) unsatisfactory/fair training sortie.

On 2 Apr 10, according to a Staff Judge Advocate (SJA) memorandum, dated 24 Nov 10, the applicant wrote a memorandum to his wing commander (WG/CC) and requested an FEB not be convened because his Flying Training Unit (FTU) personnel did not give him the opportunity to correct his identified deficiencies.

On 4 May 10, the applicant's operations group deputy commander (OG/CD) notified the applicant through an email that, "We are getting ready to give it and the waiver letter to the Boss…. If all concur then the FEB is waived and you are out of training… If the Boss (or any level on the journey) non-concur the FEB process commences and you will get presented the FEB letter…"

On 10 May 10, the applicant was notified by the acting OG/CC that the OG was recommending a waiver to the FEB.

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On 24 May 10, the applicant submitted a formal request for waiver of FEB and acknowledged his understanding that if approved, he would be eliminated from the KC-10 PIC. He also indicated his understanding that his request for waiver could be disapproved at any level of command, in which case FEB proceedings would resume.

On 24 May 10, on the advice of counsel, the applicant wrote a second memorandum to his WG/CC, which he believes was protected communication. The applicant stated he had received the FEB package and identified significant errors in the justification related to the FEB recommendation and he never received fair consideration of additional training. He also indicated his family circumstances had changed and he requested the FEB not be convened and he be reinstated into training. On an unknown date, the WG/CC denied the waiver request and directed the FEB be convened.

According to an SJA memorandum, dated 24 Nov 10, the FEB convened 12-14 Jul 10 and found the applicant failed to meet training standards in accordance with AFI 11-402, *Aviation and Parachutist Service, Aeronautical Ratings and Aviation Badges* paragraphs 4.3.3 and 4.3.4. by 1) not attaining a proficient level in instructor duties, airmanship, night receiver air refueling (A/R) and autopilot A/R, and 2) he lacked judgement in performing aircraft duties by "electing to willfully continue training while subjected to major outside stressors and failure to realize that his performance may be affected." The SJA found the FEB proceedings to be fair and impartial and there was ample evidence supporting the allegation the applicant failed to meet training standards and noted a discrepancy with the allegation he lacked judgment in that it was general in nature and lacked specificity. The SJA recommended the applicant be permanently disqualified from aviation service for failing to meet training standards (vice lack of judgment), and that he be permitted to retain the aviation badge.

Per AMC/A3T (Air Mobility Command Aircrew Operations and Training Division) memorandum, dated 18 Jan 11, the AMC/CC approved the applicant's permanent disqualification from aviation service for failure to meet training standards. It was directed that aeronautical orders be published assigning Aviation Service Code (ASC) 05, which denotes "*Disqualification from Aviation Service-Flying Evaluation Board*" for failure to meet training standards. He was permitted to wear the aviation badge.

According to the Flying Training KC-10 PIC Training Syllabus, dated 30 Sep 06, Figure 2-1, progress review triggers include overall lesson/sortie grade of "fair" or "unsatisfactory" for a third consecutive time, failure to meet Required Proficiency Levels (RPL), Aircrew Training System (ATS) site manager recommendation, OSS Commander-directed, unsatisfactory open/closed/Instrument Refresher Course (IRC) or other syllabus-directed examinations. Progress review determinations are made to determine retraining, training modification or FEB.

According to AFI 11-2KC-10, Volume 1, *KC-10 Aircrew Training*, XXX AFB Supplement, paragraph 1.16.1, a PRB will be conducted if the student fails to progress. The PRB will be convened to review the trainee's records and recommend continuing training, retraining, modify training or an FEB.

On 12 Jul 13, the applicant submitted DD Form 149, *Application for Correction of Military Record Under the Provisions of Title 10, United States Code, Section 1552 (10 U.S.C.* § 1552), and requested the FEB be removed from his records, his flying record be changed to reflect an administrative withdrawal from the KC-10 PIC, his disqualification from aviation service be rescinded, and his flight status be reinstated. On 9 Dec 14, the Board considered and denied the applicant's request finding the applicant had provided insufficient evidence to demonstrate the existence of an error or injustice. The Board noted although three consecutive failures was a reason for the convening of a PRB it was not the only reason listed in the 2006 KC- 10 PIC syllabus and

it included several other reasons, and the applicant had not provided substantial evidence to persuade the Board that the PRB was unjustly convened or that the actions taken were inappropriate. The applicant's primary contention was that the PRB was unwarranted and issued in error due to a mistake in his formal training syllabus during the PIC. He asserted that, without the error, he would not have been subjected to an FEB in 2010 or disqualified from aviation service.

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

On 15 Nov 18, the applicant filed a reprisal complaint against his OG/CC (FRNO Work-Product). the SAF/IG closed the complaint on 12 Mar 19, and determined it was untimely in accordance with AFI 90-301, *Inspector General Complaints Resolution*, paragraph 2.5.2 "The IG may dismiss a complaint if, given the nature of the alleged wrong and the passage of time, there is reasonable probability insufficient information can be gathered to make a determination, and/or no special Air Force interests exist to justify investigating the matter," as it had been over eight years since the alleged protected communication and personnel action occurred and there were no special Air Force interests to justify an investigation.

On 1 Sep 20, the applicant submitted DD Form 149 and requested reconsideration of his request under the whistleblower provisions of the DoDD 7050.06 and 10 U.S.C. § 1034. The applicant contended his OG/CC retaliated against him after seeing a protected memorandum for record (MFR), written by the applicant, dated 24 May 10, wherein he reported the OG/CC had engaged in a pattern of failing to follow regulations. The applicant alleged the OG/CC changed his recommendation to waive the FEB and instead pressed for a full FEB and his removal from aviation service, using the MFR as evidence constituting retaliation. The MFR was then used as evidence during his FEB. Additionally, during a meeting in Sep 19 with the FEB convening authority, he discovered that at the time the convening authority was deciding whether to convene the FEB, the OG members ostensibly actively withheld crucial exonerating information about the applicant's training. The convening authority was most likely unaware the OG/CC changed his recommendation and pressed for a full FEB, in retaliation for him writing the MFR. In support of his reconsideration request, the applicant submitted new evidence, including a copy of the MFR he alleges constitutes a protected communication, as well as an MFR documenting a meeting with the convening authority of the FEB.

On 14 Jan 22, the Board determined the applicant's new evidence was insufficient to overturn the previous Board's decision or to substantiate claims of reprisal. The Board noted that while the Inspector General (IG) determined the applicant's complaint of reprisal was untimely submitted, the Board reviewed the complete evidence of record to reach its own independent determination of whether reprisal occurred. The Board concluded the applicant's FEB was a result of his lack of judgement and failure to meet training standards, which was within the WG/CC's authority to initiate. In the absence of persuasive evidence to the contrary, the Board did not find the applicant was the victim of reprisal pursuant to 10 U.S.C. § 1034.

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

On 1 Jun 23, the Office of the Under Secretary of Defense for Personnel and Readiness (OUSD P&R) remanded the applicant's case to the AFBCMR for reconsideration. On 29 Apr 24, pursuant to the MWPA, 10 U.S.C. § 1034, the applicant appealed to the OUSD P&R to review the AFBCMR's final decision on allegations of reprisal under 10 U.S.C. § 1034. After careful consideration, the OUSD P&R did not find the applicant established the required elements of reprisal by clear and convincing evidence in accordance with the MWPA: 1) that he made a

protected communication; 2) that a responsible management official (RMO) knew or perceived he made or prepared to make the protected communication; 3) that a personnel action was taken, withheld, or threatened to be taken or withheld; and 4) that the RMO took, withheld, or threatened the personnel action because he made or prepared to make a protected communication. OUSD P&R further indicated when the AFBCMR elected to hear the applicant's MWPA claim, despite SAF/IG' s refusal to investigate citing the 8-year delay before requesting review of the events in question (and the DoD IG approved this decision), the AFBCMR assumed responsibility for ensuring the analysis required to evaluate the MWPA. OUSD P&R determined the AFBCMR's Addendum to Record of Proceedings (ROP) failed to document the appropriate legal analysis was conducted in accordance with the four essential elements of the MWPA and returned the decision to the AFBCMR for review. Subsequently, the AFBCMR reopened the applicant's case on their own motion.

The OUSD P&R letter is at Exhibit Q.

APPLICABLE AUTHORITY/GUIDANCE

Per 10 U.S.C. § 1034 and DAFI 90-301 reprisal against military members for making protected disclosures is prohibited.

10 U.S.C. § 1034(g)(2), Correction of Records When Prohibited Action Taken. In resolving an application for which there is a report of the IG, the AFBCMR shall review the report of the IG.

10 U.S.C. § 1034(h), Review by the Secretary of Defense (SECDEF). Upon the completion of all administrative review, the member or former member who made the allegation, if not satisfied with the disposition of the matter, may submit the matter to the SECDEF. The SECDEF shall decide to reverse or uphold the decision of the Secretary of the military department concerned in the matter within 90 days after receipt of such a submittal.

Application of 10 U.S.C. § 1034 is guided by DoD Directive 7050.06, *Military Whistleblower Protection Act*, 17 Apr 15 (Incorporating Change 1, 12 Oct 21). The acid test for reprisal is as follows: (1) Did the military member make or prepare to make a communication protected by statute, DoD Directive, or AFI 90-301; (2) Was an unfavorable personnel action taken or threatened or was a favorable action withheld or threatened to be withheld following the protected communication; (3) Did the official responsible for taking, withholding, threatening, or influencing the personnel action know about the protected communication; (4) Does the preponderance of the evidence establish that the personnel action would have been taken if the protected communication had not been made. When answering the fourth question, the following five factors are considered: (1) Reasons the official took the action; (2) Reasonableness of the action taken considering complainant's conduct; (3) Consistency of the action with the official's past practice; (4) Motive of the official for taking the personnel action; and (5) Procedural correctness of the action.

AIR FORCE EVALUATION

SAF/IGQ does not provide a recommendation. Instead, they offer a summary of the applicant's reprisal claim along with guidance on analyzing claims of reprisal. Per AFI 90-301, paragraph 2.5.2 "...The IG may dismiss a complaint if, given the nature of the alleged wrong and the passage of time, there is reasonable probability insufficient information can be gathered to make a determination, and/or no special Air Force interests exist to justify investigating the matter." The alleged protected communication and personnel action occurred over eight years ago and there are no special Air Force interests to justify an investigation. The applicant submitted a potential reprisal complaint to the IG on 6 Nov 18; however, the complaint was submitted over eight years

after the alleged reprisal would have occurred in 2010. SAF/IG conducted a thorough analysis of the applicant's complaint and supporting documents and determined it was submitted untimely - over eight years after the alleged events of reprisal and DoD IG approved the findings. Therefore, the complaint does not meet the reprisal complaint criteria as it was determined to be untimely. Once determined as untimely, there is no requirement to complete a full analysis of potential reprisal as defined by DoDD 7050.06, 17 Apr 15, paragraph 3.e., "No investigation is required when a Service member (hereinafter, use of "Service member" includes both current and former Service members) submits a reprisal complaint more than 1 year after the date that the member became aware of the personnel action that is the subject of the allegation." SAF/IGQ recommends the AFBCMR review the remaining evidence and decide as appropriate.

The complete advisory opinion is at Exhibit R.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 5 Dec 24 for comment (Exhibit S), and the applicant replied on 20 Dec 24. In his response, the applicant asserts his reprisal allegation was submitted timely in accordance with DoDD 7050.06, as he became aware of the reprisal personnel action on 6 Sep 19 and his DD Form 149 was submitted on 1 Sep 20. Additionally, the evidence he submitted with his previous AFBCMR case, the FEB sworn testimony and documented emails, prove the OG/CC retaliated against him by recommending a full FEB after reading his protected communication MFR. He implores the Air Force to answer why he was removed from upgrade training in the first place. Furthermore, the applicant asserts he was not aware of the 30-day determination, dated 26 Nov 18, completed by his major command IGQ until a copy was provided with the SAF/IGQ advisory opinion. He also asserts there are significant errors within the determination and a revealing acknowledgement that supports his whistleblower claim. He reiterates his contention that his complaint met the regulation requirement for timeliness, and there is more than enough evidence to thoroughly investigate his claims. The only just remedy is to purge the FEB from his record and if needed, change his removal from training to an administrative withdrawal from upgrade training.

The applicant's complete response is at Exhibit T.

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 a thorough review of all submitted exhibits and relevant materials, the Board finds that the evidence presented does not substantiate an error or injustice. In accordance with the remand directive from the OUSD P&R, the Board reopened the applicant's case to assess the four essential elements of reprisal under the MWPA in relation to his request for relief. Specifically, the Board reconsidered the applicant's request for:

1. Removal of the Flying Evaluation Board (FEB) from his records;

2. Amendment of his flying record to reflect an administrative withdrawal from the KC-10 Pilot Instructor Course (PIC);

3. Rescission of his disqualification from aviation service;

4. Reinstatement of his flight status; and

5. Consideration of his allegations of reprisal under DoDD 7050.06 and 10 U.S.C. § 1034, *MWPA*.

It has been more than 14 years since the alleged reprisal occurred. While the Board does not function as an investigative body pursuant to Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR),* it proactively sought additional information by contacting the Air Force Inspector General, Directorate of Complaints Resolution (SAF/IGQ) for a copy of the applicant's reprisal complaint. The Board reviewed the complaint, the advisory opinion provided by SAF/IGQ, the applicant's response to the advisory opinion, and the applicant's previous AFBCMR cases to determine whether the applicant experienced reprisal. The Board finds no evidence that any personnel actions were taken, withheld, or threatened against the applicant in reprisal for the convening or outcome of the FEB. The Board also notes the SJA found the FEB proceedings to be fair and impartial and there was ample evidence supporting the allegation that the applicant failed to meet training standards. Moreover, the Board finds no causal connection between the MFR the applicant believes to be a protected communication and the convening or decision of the FEB. Under the presumption of regularity, military commanders and administrative officials are presumed to act lawfully, in good faith, and with proper discretion in the execution of their duties. The Board concurs with prior determinations that there is no evidence to support the claim the applicant was subjected to reprisal in violation of 10 U.S.C. § 1034. Further, there is no evidence the Board's prior decision to deny relief was arbitrary, capricious or contrary to law.

The MWPA establishes that reprisal occurs when an unfavorable personnel action is taken against a service member because they made a protected communication to an authorized government recipient. The applicant has provided some evidence that he may have made a protected disclosure to his WG/CC. However, the Board finds:

1. No Evidence of Knowledge or Influence

a. There is no evidence that the OG/CC was aware of the applicant's MFR at the time of his decision.

b. There is no evidence that the OG/CC changed his recommendation regarding the FEB based on the MFR.

2. No Evidence of Causal Connection

a. The preponderance of the evidence does not support the claim that the FEB would not have been convened had the applicant not submitted the MFR.

b. The FEB proceedings and outcomes were reviewed by legal authorities, and the SJA concluded that the FEB was conducted fairly and impartially.

c. There is no substantiated link between the applicant's alleged protected communication and the FEB decision.

Based on the foregoing analysis, the Board concludes that the applicant has not demonstrated, by a preponderance of the evidence, that reprisal occurred under the four required elements of MWPA. The applicant has not substantiated that his MFR was a contributing factor in the decision to convene the FEB. The evidence does not establish a genuine connection between the FEB and the MFR, nor does it indicate that the FEB process was conducted improperly or unfairly. 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 DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2014-02210-3 in Executive Session on 23 Jan 25:

Work-Product Panel Chair
Work-Product Panel Member
Work-Product, Panel Member

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

Exhibit P: Record of Proceedings, w/ Exhibits A-O, dated 14 Jan22.
Exhibit Q: Letters, OUSD P&R, dated 1 Jun 23.
Exhibit R: Advisory, SAF/IGQ, w/atch (FRNO Work-Product), dated 10 Sep 24.
Exhibit S: Notification of Advisory to Applicant, SAF/MRBC, dated 5 Dec 24.
Exhibit T: Applicant's Response to Advisory, dated 20 Dec 24.

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.

4/24/2025

X Work-Product

Board Operations Manager, AFBCMR
Work-Product