

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXXXXXXXXXX

DOCKET NUMBER: BC-2016-02714

COUNSEL: XXXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Board reconsider his request to set-aside his Article 15, non-judicial punishment (NJP).

RESUME OF THE CASE

The applicant is a retired Air Force colonel (O-6).

On 18 Apr 08, while serving as a deployed group commander, the applicant was notified of his commander's intent to impose NJP for one charge and two specifications of disrespect toward a superior commissioned officer in violation of Article 89, Uniformed Code of Military Justice (UCMJ); one charge and one specification of cruelty and maltreatment in violation of Article 93, UCMJ; and one charge and two specifications of conduct unbecoming an officer and gentleman in violation of Article 133. On 28 Apr 08, the applicant waived his right to a court-martial, accepted NJP, consulted with a lawyer, provided written matters in his defense, and made a personal, non-public appearance before the commander. On 1 May 08, the commander found the applicant had committed the offenses and imposed a punishment of forfeiture of \$4,769 pay for one month and a reprimand. The applicant did not appeal the findings or punishment; however, he requested the NJP not be placed in his Officer Selection Record (OSR). The commander denied the request and the NJP was placed in his OSR. On 16 May 08 and 18 May 08, the NJP was found legally sufficient.

On 29 Apr 11, the applicant submitted DD Form 149, *Application Air Force Board for Correction of Military Records*, and requested his Article 15 NJP be set aside and all reference to the action be removed from his record (BC-XXXX-XXXXX). Through counsel, the applicant contended he was caught up in "office politics," in that he became the target of a superior commander who had a personality conflict with the applicant, and he was a target of disgruntled subordinates who saw a Unit Climate Assessment (UCA) and Commander-Directed Investigation (CDI) as opportunities to attack him. Furthermore, he was not able to have his Area Defense Counsel (ADC) present at this personal hearing with the commander and he was not provided with a copy of the CDI to prepare for the hearing (Exhibit L).

AFLOA/JAJM provided an advisory opinion and concluded the applicant's Article 15 NJP was legally and procedurally proper, and no error or injustice occurred warranting its removal from the record. The applicant alleged procedural error due to not having a spokesperson during his appearance before the commander and claimed injustice regarding the punishment's severity. AFLOA/JAJM noted the Manual for Courts-Martial (MCM), Part V, paragraph 4(c)(1)(B) states that members "shall be entitled to: (B) Be accompanied by a spokesperson provided or arranged for by the member." However, "such spokesperson is not entitled to travel, or similar expenses and the proceedings need not be delayed to permit the presence of a spokesperson. There is no documentation indicating the applicant was denied a spokesperson and even if a spokesperson was not permitted, it does not render the NJP invalid. The applicant was afforded due process: he made a personal appearance, submitted written matters, and had the opportunity to appeal, but did not.

AFLOA/JAJM opined that raising the spokesperson issue over three years later when it was not raised at the time and with the commander best able to grant relief, it should be treated as a waiver of the issue. AFLOA/JAJM further noted that regarding fairness, the applicant admitted to making derogatory comments but argued they occurred in private. The legal standard clarifies that conversations between commanders and executive officers in a deployed setting are not considered purely private. The commander's assessment of these statements as disrespectful under Article 89, UCMJ, was not arbitrary. The applicant also denied allegations of maltreatment and manipulating a UCA. However, his version of events does not clearly refute the commander's findings, and the available evidence supports the commander's determinations. AFLOA/JAJM concluded the NJP was properly imposed. The commander's discretionary judgment was supported by the evidence and conducted in accordance with governing authorities and there is no clear error or injustice warranting relief.

On 8 Jul 11, the Board staff provided the applicant with a copy of the AFLOA/JAJM advisory opinion for review and comment and on 18 Jul 11, the applicant requested a 90-day extension or, alternatively, to temporarily withdraw his application due to his pending deployment and to gather additional evidence on his behalf. In accordance with statutory time limitations mandated by Congress, extensions are not granted. Instead, cases are administratively closed without prejudice. Upon receipt of the applicant's additional evidence and request for reinstatement, their case is reopened and continued for processing.

On 15 Feb 12, the applicant's NJP and associated documents were removed early from his Officer Selection Record upon his request and in light of his pending retirement.

On 30 Jun 12, the applicant was retired from the Regular Air Force.

On 4 Jul 16, the applicant submitted a second DD Form 149, again requesting that his NJP be set aside. The basis for his request remained unchanged from his prior submission. The application was assigned a new docket number, BC-XXXX-XXXXX. On 28 Mar 18, after full consideration of the evidence of record and the applicant's contentions, the Board denied the request concluding the applicant had provided insufficient evidence of an error or injustice to justify relief. The Board sought a new advisory opinion from AFLOA/JAJM, and concurred with their findings that there was no indication the NJP was legally or procedurally deficient, and the action appeared well within the commander's lawful discretion. The Board also considered the applicant's acknowledgment: "I have accepted full responsibility for my actions that adversely affected my command." Additionally, the Board noted the applicant did not file the application within three years after the alleged error or injustice was discovered, or should have been discovered, as required by Title 10, United States Code, Section 1552, and Air Force Instruction 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*.

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 F.

The applicant appealed to the U.S. District Court and requested his matter be remanded to the AFBCMR. He contended that the AFBCMR did not consider his response to the 2018 AFLOA/JAJM Advisory Opinion when they made their decision to deny setting aside his Article 15 NJP and mistakenly referred to his 2017 supplemental submission as his response. On 14 Nov 24, The Court remanded Count II to the AFBCMR and stayed the remainder of the case (removal of an Officer Performance Report).

1) Afford the applicant and his counsel the opportunity to file, within 60 days of the Court's remand Order (unless the time is extended by agreement of the parties), with AFBCMR, any new arguments and materials in support of his claims to set aside the NJP.

2) Upon receipt of the applicant and his counsel's new arguments and evidence, afford the AFBCMR the opportunity to obtain any new required advisory opinion(s) surrounding his arguments that more adequately and fully explain recommendations, basing its review on all relevant facts, policies, and legal authorities.

3) Afford the applicant and his counsel 30 days to respond to any new advisory opinion(s) obtained by the AFBCMR and provided to the applicant and his counsel.

4) Afford the AFBCMR the opportunity to reconsider all the evidence in this NJP related matter, including any new advisory opinions, responses to any new advisory opinions, the arguments made in his Complaint in this matter, any new allegations of error or evidence he and his counsel submit, as well as any errors alleged in his initial NJP-related applications to the AFBCMR.

a. After considering all arguments and evidence, the AFBCMR will specifically address the following issues in their decision:

i. Explain whether and why the applicant's 4 Jul 16 submission should or should not be treated as a timely challenge to his May 08 NJP;

ii. Explain the basis for the AFBCMR's policy or practice, or action in this matter, of requiring that an applicant request that their case be "temporarily withdrawn" if they request additional time to respond to an advisory opinion; and

iii. Explain its policy or practice, if any, of administratively closing a case and how such "administrative closure" affects the status of an application and future submissions seeking the same relief.

b. If the AFBCMR determines that the applicant's 2016 Petition is untimely, the AFBCMR should specifically describe how they reached that decision, and whether waiver "in the interest of justice" is appropriate; in making that determination, the AFBCMR shall expressly consider and address the circumstances and evidence surrounding the "Administrative Closure" of his timely May 2011 Petition and/or any other factors or issues he raises with respect to the timeliness issue.

c. If the AFBCMR determines that either the 2016 Petition was timely, or that other circumstances warrant consideration of his request that the NJP be set aside the AFBCMR should specifically describe how they reached that decision based on any previous or new factual and/or legal arguments and/or evidence presented by the applicant.

5) Afford the AFBCMR the opportunity to make new written findings to the Secretary of the Air Force or his delegee, and to prepare a Record of Proceeding (ROP) following its deliberations that adequately explains its decision.

On 7 Jan 25, through counsel, the applicant submitted a new DD Form 149 requesting his NJP be set aside and contended the NJP was procedurally and factually deficient. In addition to his application, supplemental documents, and advisory response in his initial request (BC-XXXX-XXXXX), the applicant provided supplement arguments for the Board's consideration: 1) Neither his acceptance of the NJP nor his decision not to immediately appeal the NJP alters the AFBCMR's duty to now consider all aspects of his request; 2) The NJP was procedurally flawed in that he was deprived of the right to have his counsel in attendance against his clear request but to review documents material to the substance of the proceedings per MCM, part V 1(i); 3) the NJP allegations were fatally deficient or otherwise unjust in that the allegations were unsubstantiated by the CDI, unsupported by the evidence, contradicted by credible evidence or otherwise unjust;

4) Flaws in the conduct of the CDI further undermine the NJP findings in that the investigating officer (IO) failed to interview credible witnesses with relevant, favorable information despite his requests.

The applicant indicates the AFBCMR erroneously identified his 2017 supplemental materials as his response to the advisory opinion when in fact his responses were never considered by the Board. Additionally, the sworn affidavits and official memorandums he submitted with his previous case were provided to offer compelling evidence as to his innocence of the charges brought in the NJP actions and the Board incorrectly characterized them as “favorable letters from colleagues.”

In support of his request, the applicant provided copies of 1) his initial AFBCMR request, BC-XXXX-XXXX; 2) his responses to the AFLOA/JAJM advisory opinion, dated 5 Mar 18 and 7 May 18, BC-XXXX-XXXX; 3) a letter from his deployed wing commander, dated 29 May 13; 4) various articles; 4) Unit Effectiveness Award 6) letters of support; 7) CDI; 8) AFBCMR cases **Work-Product** and **Work-Product**; 9) Air Force Instruction 51-202, *Nonjudicial Punishment*; 10) CDI Guide; and 11) MCM excerpts.

The applicant’s complete submission is at Exhibit L.

While the Board is not an investigative body as outlined in DAFI 36-2603, *Air Force Board for Correction of Military Records*, the Board staff attempted to obtain unredacted copies of the CDI and any Inspector General complaints the applicant may have filed; however, the SAF/IGQ indicated they do not have any case files regarding the applicant and their system retains records for ten years at which time they are disposed of in accordance with records disposition and specific records are retained as permanent records on a case by case basis.

AIR FORCE EVALUATION

AF/JAJI finds insufficient evidence to recommend relief on the basis of a legal error. Both the applicant’s 14 Jun 11 and 5 Feb 18 advisory opinions thoroughly reviewed the applicant’s claim that his NJP had a procedural defect because his defense counsel was not allowed to be present at the personal hearing. As discussed in the 5 Feb 18 advisory opinion, the applicant had no substantial right to have his counsel in attendance, so he was not materially prejudiced by his absence. The applicant’s 2008 NJP was reviewed and found to be legally sufficient by two different legal offices in 2008, and subsequently in 2011 and 2018 in two legal advisory opinions requested by the AFBCMR. The additional material provided by the applicant on 5 Mar 18 and 7 May 18 do not refute this finding or any of the evidence or analysis previously provided in these advisory opinions.

Additionally, the 5 Feb 18 advisory addresses the applicant’s two remaining allegations: 1) the NJP allegations were fatally deficient or otherwise unjust as they were unsubstantiated by the CDI, or unsupported by the evidence, and 2) the CDI was flawed, which undermines the NJP findings as the investigating officer failed to interview witnesses despite the applicant’s request.

Under this analysis, there is no need to address whether the investigating officer had some duty to interview specific witnesses at the applicant’s request. The applicant attached a 29 May 13 memorandum from a general officer to his 7 May 18 submission that states: To the best of my recollection, I believe the investigation referred to in the OPR covering [the applicant’s] performance during the period 18 Feb 07 to 13 Mar 08 was a CDI that served as the basis for decisions made by [commander who imposed the NJP in questions]. This memorandum does nothing to refute the validity of the CDI or AFLOA/JAJM’s finding in their 5 Feb 18 advisory opinion. First, it is only conjecture as it was not drafted by the commander who imposed NJP on the applicant. Second, it references only an OPR, not NJP. Finally, it does not indicate what witnesses, what credibility assessments, what weight, or even how the commander may have

considered the evidence raised by the CDI in addition to other evidence when making “decisions.” As such, the additional material provided by the applicant in his 5 Mar 18 and 7 May 18 submissions do not refute these findings or any of the evidence or analysis previously provided in the AFLOA/JAJM advisory opinions. Thus, while the AFBCMR has the authority to fashion a remedy it finds necessary and appropriate within applicable legal limits, AF/JAJI finds insufficient evidence to recommend relief on the basis of a legal error.

The complete advisory opinion is at Exhibit I.

APPLICANT’S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 28 Apr 25 for comment (Exhibit J), and the applicant replied on 27 May 25. In his response and through counsel, the applicant challenges the adequacy of the 2011 and 2018 AFLOA/JAJM advisory opinions, as well as the 2025 AF/JAJI advisory opinion, asserting that their adoption by the Board without independent analysis would violate the Administrative Procedure Act (APA). Citing relevant case law, the applicant contends that decisions relying solely on advisory opinions that are themselves arbitrary, capricious, or factually flawed are insufficient to meet legal standards.

He asserts that the advisory opinions failed to properly analyze his procedural due process claims, specifically that he was denied the right to be accompanied by legal counsel at his NJP hearing despite a clear request. The 2011 AFLOA/JAJM Opinion overlooked credible, later-submitted evidence—including an affidavit from the ADC, that directly contradicts the advisory’s findings. The 2018 AFLOA/JAJM Opinion similarly ignored the affidavit and erroneously claimed no such evidence existed. This, the applicant argues, constitutes a failure to address meaningful objections and contrary evidence, rendering both opinions legally insufficient.

The applicant also challenges the substantive sufficiency of the NJP arguing that: 1) Advisory opinions erroneously dismissed the applicant’s contention that the NJP was rooted in the CDI. Evidence, including affidavits and internal memoranda, clearly demonstrate that the CDI formed the factual basis for the NJP, and that procedural flaws in the CDI taint the resulting NJP; 2) Article 89 (Disrespect) Allegation: The 2011 opinion improperly reasoned that comments made in a private setting with a fellow officer did not constitute a “purely private conversation,” contrary to the MCM and corroborating affidavits and polygraph findings; 3) Article 133 (Derogatory Language) Allegation: The CDI found insufficient evidence that the applicant used racially derogatory language. This finding undermines one of the NJP charges, yet it is not addressed in any of the advisory opinions; 4) Maltreatment of a subordinate: He provided new evidence postdating the 2011 opinion, specifically, affidavits and witness statements indicating he was unaware the individual was on profile and that she showed no visible limitations. These materials were not addressed in the 2018 or 2025 opinions; and 5) UCA Manipulation Allegation: He presented expert testimony that the UCA process violated governing Air Force policy and was procedurally flawed. These claims were ignored by the advisory opinions.

If the Board adopts these opinions without undertaking its own independent review that addresses all relevant and newly submitted evidence, such action will constitute arbitrary and capricious decision-making. He urges the Board to provide an analysis that addresses the crux of the procedural and substantive issues raised and to correct the record accordingly.

The applicant’s complete response is at Exhibit K.

FINDINGS AND CONCLUSION

1. The application was timely filed.

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

3. Pursuant to the remand order issued by the U.S. District Court, the Board conducted a de novo review of the entire record, including but not limited to: the applicant's original and subsequent submissions; advisory opinions dated 14 Jun 11, 5 Feb 18, and 31 Mar 25; the applicant's rebuttals dated 5 Mar 18, 7 May 18, and 27 May 25; all relevant case files (BC-XXXX-XXXXX and BC-XXXX-XXXXX-X); and the arguments set forth in the applicant's civil complaint. Based on this comprehensive review, the Board concludes that the applicant is not the victim of an error or injustice warranting correction of his military records. In our review, the Board explicitly followed the Court remand order to:

1) Afford the applicant and his counsel the opportunity to file, within 60 days of the Court's remand Order (unless the time is extended by agreement of the parties), with AFBCMR, any new arguments and materials in support of his claims to set aside the NJP.

2) Upon receipt of the applicant and his counsel's new arguments and evidence, afford the AFBCMR the opportunity to obtain any new required advisory opinion(s) surrounding his arguments that more adequately and fully explain recommendations, basing its review on all relevant facts, policies, and legal authorities.

3) Afford the applicant and his counsel 30 days to respond to any new advisory opinion(s) obtained by the AFBCMR and provided to the applicant and his counsel.

4) Afford the AFBCMR the opportunity to reconsider all the evidence in this NJP related matter, including any new advisory opinions, responses to any new advisory opinions, the arguments made in his Complaint in this matter, any new allegations of error or evidence he and his counsel submit, as well as any errors alleged in his initial NJP-related applications to the AFBCMR.

Additionally, the remand order listed the following three takeaways:

1) After considering all arguments and evidence, the AFBCMR will specifically address the following issues in their decision:

a. Explain whether and why the applicant's 4 Jul 16 submission should or should not be treated as a timely challenge to his May 08 NJP;

b. Explain the basis for the AFBCMR's policy or practice, or action in this matter, of requiring that an applicant request that their case be "temporarily withdrawn" if they request additional time to respond to an advisory opinion; and

c. Explain its policy or practice, if any, of administratively closing a case and how such "administrative closure" affects the status of an application and future submissions seeking the same relief.

2) If the AFBCMR determines that the applicant's 2016 Petition is untimely, the AFBCMR should specifically describe how they reached that decision, and whether waiver "in the interest of justice" is appropriate; in making that determination, the AFBCMR shall expressly consider and address the circumstances and evidence surrounding the "Administrative Closure" of his timely May 2011 Petition and/or any other factors or issues he raises with respect to the timeliness issue.

3) If the AFBCMR determines that either the 2016 Petition was timely, or that other circumstances warrant consideration of his request that the NJP be set aside the AFBCMR should

specifically describe how they reached that decision based on any previous or new factual and/or legal arguments and/or evidence presented by the applicant.

Regarding the first and second takeaway, the Board finds the applicant's 4 Jul 16 submission timely. The applicant's original 29 Apr 11 application was administratively closed upon his request to allow more time to gather additional evidence and respond to the AFLOA/JAJM advisory opinion. When such evidence was submitted on 4 Jul 16, it should have been processed as a continuation of the original case. Erroneously treating it as a new and untimely application was inconsistent with the Board's administrative practice and the statutory intent of 10 U.S.C. § 1552. The Board clarifies that it does not have an official policy requiring applicants to request "temporary withdrawal" to extend time for responses. However, in accordance with administrative practices and governing time constraints, applications may be administratively closed without prejudice to preserve an applicant's ability to respond without violating statutory timeframes. Reopened applications are processed under newly established congressional timelines. Regarding the administrative closure of the applicant's original case, the Board confirms that such closure did not prejudice the applicant's ability to submit additional materials or obtain a ruling. The 4 Jul 16 submission was received and fully reviewed, including a follow-on advisory opinion and a substantive determination on the merits.

Regarding the third takeaway, on the substantive question of whether the applicant's NJP should be set aside, the Board finds insufficient evidence to warrant relief. The Board concurs with the 2025 AF/JAJI advisory opinion, which reaffirmed the findings of the 2011 and 2018 AFLOA/JAJM legal reviews. The applicant's procedural due process claim, that he was improperly denied legal counsel at his NJP hearing is unsupported. As previously noted, the governing legal standard did not entitle the applicant to have counsel present during the hearing. The absence of counsel, even if requested, did not violate any substantial legal right nor did it materially prejudice the proceedings. The affidavits and materials submitted by the applicant, including the statement from the ADC and a general officer memorandum, do not sufficiently rebut the established findings of legal sufficiency. The general officer's recollection, offered years after the event, does not undermine the original legal reviews or the lawfulness of the NJP process. The applicant's arguments that the charges under Articles 89, 133, and 93 were unsupported or tainted by investigative error were considered and addressed by multiple legal reviews. The Board finds that the evidence relied upon for the NJP was not confined solely to the CDI and that the commander's independent assessment of the facts, combined with supporting evidence, met the threshold for initiating NJP. Allegations concerning procedural flaws in the CDI, polygraph results, and expert testimony on UCA policy, while noted, do not constitute grounds to invalidate the NJP, as they do not demonstrate that the applicant's rights were violated or that the punishment imposed was unjust. The Board notes that under 10 U.S.C. § 1552, it is empowered to grant relief where error or injustice is established. However, the burden of proof lies with the applicant, and the evidence presented does not meet that burden.

Furthermore, the Board notes counsel included as evidence, two separate AFBCMR cases. The Board reviewed these cases and did not find them persuasive or relevant to the applicant's request. In neither of the two cases did the Board find sufficient evidence to set aside the NJPs. Each case before this Board is considered on its own merits. While the Board strives for consistency in the way evidence is evaluated and analyzed, the Board is not bound to recommend relief in one circumstance simply because the situation being reviewed appears similar to another case.

The Board finds the advisory opinions were thorough, legally sufficient, and appropriately responsive to the issues raised on remand. The applicant was afforded multiple opportunities to submit arguments and evidence, all of which have been considered. The Board has independently evaluated the record and finds no error or injustice in the issuance of the NJP or the subsequent handling of his application. Therefore, the Board recommends against correcting the applicant's records.

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-2016-02714 in Executive Session on 11 Jul 25:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit F: Record of Proceedings, w/ Exhibits A-E, dated 28 Mar 18.
Exhibit G: U.S. District Court Remand Order, Joint Motion To Remand and Stay, dated 10 & 14 Nov 24.
Exhibit H: Application, DD Form 149, w/atchs, dated 7 Jan 25.
Exhibit I: Advisory Opinion, AF/JAJI, dated 31 Mar 25.
Exhibit J: Notification of Advisory, SAF/MRBC to Applicant, dated 28 Apr 25.
Exhibit K: Applicant's Response, w/atchs, dated 27 May 25.
Exhibit L: AFBCMR Docket BC-XXXX-XXXXX, various dates.

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