



Work-Product

## UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-02271

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COUNSEL: NONE

HEARING REQUESTED: NOT INDICATED

### APPLICANT'S REQUEST

1. His nonjudicial punishment (NJP) pursuant to Article 15, Uniform Code of Military Justice (UCMJ) be removed and he be reimbursed the forfeiture of pay of \$2,000 a month for two months.
2. His referred Officer Performance Report (OPR) rendered for the period 16 Jun 20 thru 15 Jun 21 be corrected.

### APPLICANT'S CONTENTIONS

His NJP was "untrue, unjust, disproven, too severe," and was because of a "personal vendetta against [him] for addressing a pervasive patient safety concern." He states he was exonerated of wrongdoing by the Credentials Function. He alleges various procedural errors with the NJP to include failure to implement progressive discipline; the NJP was not offered within 21 days or completed within 39 days; he was not made aware of the identity of the commander deciding findings and punishment; all evidence was not provided to him; the estimated timeframe of the offense was inaccurate; and the imposing commander and appellate authority predetermined denial of his appeal. The applicant provided documentation of alleged dereliction of duty by other providers who he says were not disciplined. He indicated on his DD Form 149, *Application for Correction of Military Record*, his request is related to post-traumatic stress disorder (PTSD), other mental health, and reprisal/whistleblower issues or conditions but did not provide further details.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is a former Air Force major (O-4).

On 24 May 21, the applicant filed a complaint with his wing Inspector General (IG), FRNO Work-Pr... Work-Prod..., alleging abuse of authority against his squadron commander and three members from the medical group (MDG) leadership. On 8 Jun 21 the wing IG office completed their analysis and determined his complaint was not a matter appropriate for the IG complaints resolutions system, rather it was a command issue and referred his complaint to the wing commander for review and action who assigned the case to the wing Staff Judge Advocate (SJA) for investigation. On 12 Jul 21, the SJA completed their examination of the applicant's allegations and concluded the following:

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**ALLEGATION #1** The applicant alleged his squadron commander did not allow him to attend the Transition Assistance Program (TAP) until after he confirmed a separation date. The SJA concluded the squadron commander did not abuse his authority and policy requires RegAF members to have an Expiration of Term of Service (ETS) in the military personnel system to attend TAP.

**ALLEGATION #2** The applicant's squadron commander denied the applicant for SkillsBridge but approved it for others. The SJA concluded the squadron commander did not abuse his authority and the denial was based on manning/personnel issues in the squadron at the time.

**ALLEGATION #3** The applicant's squadron commander denied the applicant's request for primary caregiver leave. The SJA concluded the squadron commander did not abuse his authority because he approved the applicant's request for primary caregiver leave.

**ALLEGATION #4** The applicant's squadron commander denied the applicant terminal leave. The SJA concluded the squadron commander did not abuse his authority and the denial was based on manning/personnel issues in the squadron at the time and would have interfered with the mission.

**ALLEGATION #5** The applicant's squadron commander denied the applicant permissive temporary duty for 20 days of job hunting. The SJA concluded the squadron commander did not abuse his authority and the denial was based on manning/personnel issues in the squadron at the time.

**ALLEGATION #6** The MDG commander, deputy commander and chief medical officer abused their authority when they approved an order delivered through a memorandum for the applicant to correct 500 medical notes and therefore caused fraud, waste, and abuse. The SJA concluded the MDG leadership did not abuse their authority as the font used by the applicant was unprofessional.

On 3 Jun 21, the MDG commander, on behalf of the numbered Air Force (NAF) commander, offered the applicant NJP action pursuant to Article 15, UCMJ, in violation of Article 92; for dereliction of duty on diverse occasions from about 3 Dec 20 to about 26 Mar 21 for failure to properly review medical records from patients' off-base referrals as it was his duty to do. On 10 Jun 21, the applicant appealed the action and on 22 Jun 21, the NAF commander denied the applicant's appeal and determined the action would be filed in his Officer Selection Record. On 25 Jun 21, the appellate authority also denied his appeal. The NJP was found legally sufficient on 28 Jun 21. The applicant received a reprimand and forfeiture of \$2,000 pay per month for two months.

On 22 Jun 21, the applicant was issued a referral OPR for reason of, "Failed to properly review CLRs as required; exposed pts & DOD to significant risks - receiv'd Art 15 from 18 AF/CC."

On 29 Jun 21, the applicant resigned and was issued an honorable service characterization.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisories at Exhibits C, D, and E.

## **APPLICABLE AUTHORITY/GUIDANCE**

Per Title 10 United States Code Section 1034 (10 U.S.C. § 1034) and Department of the Air Force Instruction (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.

AFI 90-301, *Inspector General Complaints Resolution*, paragraph 5.2.4., Department of the Air Force military members may file complaints of reprisal with IG at any level and receive protections of 10 U.S.C. § 1034. paragraph 5.2.5., To gain statutory protection of the law, the service member must file the complaint with any IG within one year of becoming aware of the personnel action that is subject of the allegation. The IG may waive this time requirement if they determine there are extenuating circumstances justifying the delay in filing the complaint or there is a special interest in the matter. Table 3.13, Rule 3, When to Dismiss a Complaint, Timeliness of Complaints. There is no time limit for restriction complaints. If the IG determines given the nature of the alleged wrong and the passage of time, there is a reasonable probability that insufficient information can be gathered to make a determination, Dismiss the complaint. Note 1. With the passage of time, it becomes increasingly difficult to gather relevant evidence, testimony and information.

AFI 36-2406, *Officer and Enlisted Evaluation Systems*, paragraph 1.11.1, Purpose. Referral procedures are established to allow the ratee due process by giving the ratee an opportunity to respond and/or rebut any negative comments before it becomes a matter of record.

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

## AIR FORCE EVALUATIONS

AFRBA Psychological Advisor completed a review of all available records and finds insufficient evidence to suggest the applicant had any mental health condition when he was derelict in the performance of his duties or when he was reprimanded. The applicant's Article 15 noted he was derelict in the performance of his duties from 3 Dec 20 to about 26 Mar 21. He was notified on 3 Jun 21 of his reprimand (Article 15). The applicant was evaluated on numerous occasions prior to his Article 15 on 3 Jun 21 and was determined not to have any mental health conditions. An encounter on 19 Feb 20 found no history of mental health treatment and cleared him for deployment. A mental health assessment completed on 3 May 21 indicated the applicant denied PTSD and depressive symptoms. He did indicate work stressors but was not diagnosed with any mental health condition. The applicant self-referred for a psychological evaluation on 11 May 21 and it was determined he did not meet the criteria for any mental health diagnosis. His Report of Medical Examination at separation, dated 21 Jun 21, noted he did not have any mental health symptoms (psychiatric-normal).

It was not until 24 Jun 21 the applicant was diagnosed with a mental health condition, approximately one week before his military separation. The applicant himself noted (BCMR article appeal) his mental health condition was the result of his punishment and he sought mental health treatment during the processing of his final days in the military.

While the applicant contends he was diagnosed with PTSD (24 Jun 21), this diagnosis was later clarified and rescinded based on his Compensation and Pension examination completed on 31 May 23. The examiner noted the criteria used to establish a PTSD diagnosis did not meet the DSM 5 criteria to appropriately diagnose the applicant with PTSD.

His service-connected diagnosis of adjustment disorder with mixed anxiety and depressed mood appears to be the result of his reprimand and the consequences of his dereliction of the performance of his duties. Therefore, the psychological advisor concludes the applicant's mental health condition does not mitigate or excuse his dereliction of the performance of his duties as it occurred prior to any mental health condition. Even if his mental health condition occurred prior to his dereliction of the performance of his duties, it would not be a mitigating factor. The applicant's Article 15 noted he willfully failed to properly review medical records from patients' off-base referrals, by signing patient charts without properly reviewing them for approximately four months. His behavior demonstrates a conscious, willful act perpetrated over time that has no nexus with a potential mental health condition.

The complete advisory opinion is at Exhibit C.

AFPC/DPMS recommends denying the applicant's request to correct his referred OPR. The applicant did not file an appeal through the Evaluation Report Appeals Board (ERAB) under the provisions of AFI 36-2406, *Correcting Officer and Enlisted Evaluation Reports*, due to his separation status from active duty. Furthermore, paragraph A2.4. Time Limit Waivers. The applicant can request a waiver of the 3-year time limit by citing unusual circumstances that prevented filing the appeal in a timely manner. The applicant has not provided a convincing circumstance that would have prevented him from submitting the application in a timely manner.

The applicant received a referral OPR in conjunction with receiving and Article 15 for his derelict in performance where he failed to properly review medical records from patients off-base referrals. IAW AFI 36-2406, paragraph 1.12.4.1.4. when determined derogatory information conduct is appropriate for comment, refer to the underlying performance, behavior or misconduct itself and not merely to the fact that the conduct may have resulted in a punitive or administrative action taken against the member (such as a letter of reprimand, Article 15, court-martial conviction). In this case, the applicant's rating chain chose to comment on the contested report which caused the report to be referred.

The applicant does not provide any evidence that would substantiate his assertions of inconsistencies in investigation of the incident by his rating chain. Evaluators are strongly encouraged to comment on misconduct by the ratee, in this case they clearly exercised that option. To prove any allegations of unfair or overly harsh treatment, the applicant would have to provide the results of an independent IG, Commander Directed Investigation (CDI) or other official investigation finding germane to his appeal, which are considered credible sources.

The applicant has not provided compelling evidence to substantiate the contested reports were unjust or inaccurate. The applicant also did not provide factual, specific, and concrete information from his rating chain officials who would have had direct firsthand observation and could have

validated the applicant's claim. An evaluation report is considered to represent the rating chains best judgment at the time it was rendered. Once a report is accepted for file, only strong evidence to the contrary warrant's correction or removal from an individual's record. The applicant did not prove the report was not rendered in good faith by all evaluators based on knowledge available at the time.

The complete advisory opinion is at Exhibit D.

AF/JAJI recommends denying the applicant's request to remove his NJP finding no evidence of procedural legal errors with the NJP.

A rational factfinder could conclude it more likely than not the alleged misconduct occurred under the effective beyond a reasonable doubt standard of proof. DAFI 51-202, *Nonjudicial Punishment*, 6 Mar 19, paragraph 3.4. Every reasonable inference from the evidence supports the decisions of the principals who resolved questions of fact and took the actions at issue. All procedural and due process requirements were complied with. There is no evidence of an abuse of discretion.

AFI 44-176, *Access to Care Continuum*, 8 Sep 17 (Certified Current 22 Apr 20), Table A2.1, No. 33, requires providers to document their review of network results/CLRs within three business days from receipt of the telephone consult. "Completed [telephone consults] are assumed to mean [...] the provider has reviewed the result/report [...]." *Id.* A duty to review network results/CLRs is imposed by AFI 44-176. The applicant's annotations in the medical records that no review was completed due to manning shortages is acknowledgement he was aware of this duty. The applicant's non-review of hundreds of records, evidenced by his annotations, was not in compliance with the AFI. The review is apparently required for purposes of patient safety and without it, the Air Force may be exposed to liability risk.

In accordance with AFI 44-119, *Medical Quality Operations*, 16 Aug 11, paragraph 9.1, the Credentials Function review was for purposes of determining whether adverse clinical action was warranted (e.g. suspension of privileges) due to a threat to patient safety or to the integrity of the Air Force Medical Service related to clinical incompetence, professional misconduct, or impairment. A determination whether adverse clinical action is warranted is not equivalent to a determination whether adverse administrative action (e.g. NJP) is warranted. *Id.* at paragraph 9.2. The timing of the NJP, requiring the applicant to be recalled from leave for service, and just weeks before his separation date, was unfortunate. The referral OPR was a follow-on action concerning the misconduct addressed by the NJP.

Forfeitures of \$2,000 pay per month for two months by the imposing commander, a general officer, was a permissible punishment. DAFI 51-202, Table 3.2. Forfeiture of \$2,000 pay per month for one month was the total amount effectuated because of the applicant's separation date.

The applicant alleged multiple procedural errors with the NJP. There is no evidence of any procedural errors. They are addressed as follows:

1) The concept of progressive discipline does not preclude initiating an NJP when appropriate to address the misconduct at issue, even where there is no disciplinary history. "A commander who initiates NJP action and imposes punishment acts on the basis of information the commander determines relevant" and their "action must be temperate, just, and conducive to good order and discipline." DAFI 51-202, paragraph 3.1 "After making a preliminary inquiry, the

commander consults with the servicing SJA to determine whether NJP is appropriate [...].” DAFI 51-202, paragraph 3.6.1.

2) While NJP “should [be offered] within 21 days of the date of discovery of the offense,” Id. at paragraph 3.3.1, this is not a mandatory requirement evidenced by use of the word “should,” versus “must” or “shall.”

3) The applicant was informed of the identity of the commander who would make the findings and punishment decisions before his decision was required whether to accept NJP or demand trial by court-martial.

4) The applicant was entitled to and provided access to all documentary evidence the commander examined and intended to rely upon in arriving at a decision whether to impose NJP and the quantum of punishment imposed. He was not entitled to all the evidence, only the evidence his commander relied upon.

5) The specification in the NJP properly alleges the estimated timeframe of the offense as “from about 3 Dec 20 to about 26 Mar 21” consistent with the available facts and evidence. Id. at paragraph 3.7. An exact date the dereliction of duty offense ended is not required, hence use of the word “about.”

6) The official NJP in the applicant’s personnel record shows both the imposing commander and appellate authority signed the AF Form 3070C, denying Applicant’s appeal, after the date of Applicant’s election and written submission on appeal, not before. This confirms they did not make a decision before Applicant submitted his appeal.

Concerning the applicant’s allegations of dereliction of duty against other providers based on their annotations in medical records, AF/JAJI cannot advise whether those allegations amount to dereliction of duty and how that compares to the applicant’s case.

The applicant indicated reprisal/whistleblower issues are related to his request. The Military Whistleblower Protection Act, 10 U.S.C. § 1034, prohibits reprisal against service members who make, or are perceived as making, a protected disclosure within the scope of the law to an authorized government recipient. The applicant provided some evidence he may have made a protected disclosure to his supervisory chain of command (e.g. staffing shortages impacting work) or to the IG (e.g. the applicant states he filed an IG complaint but provided no evidence of that complaint in his submission to the BCMR). However, there is no evidence the NAF/CC knew of those disclosures or NJP action would not have been taken if the applicant had not made those disclosures (i.e. there is no evidence of a genuine connection between the NJP and the disclosures).

The complete advisory opinion is at Exhibit E.

## **APPLICANT’S REVIEW OF AIR FORCE EVALUATIONS**

The Board sent copies of the advisory opinions to the applicant on 6 Feb 25 for comment (Exhibit F) and the applicant has not responded.

## **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 concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendation of the AFRBA Psychological Advisor, AFPC/DPMS, and AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant's contentions.

With respect to the applicant's request for removal of the Article 15 and reimbursement of forfeited pay, the Board finds insufficient evidence of a legal or procedural error in the administration of the NJP under Article 15, UCMJ. The NJP was offered, adjudicated, and reviewed in accordance with governing directives, including DAFI 51-202. The legal advisory from AF/JAJI confirms all procedural safeguards were followed, and no abuse of discretion was identified. Contrary to the applicant's contention, progressive discipline is not a prerequisite for NJP, and the timing of the NJP, though close to his separation, was within the command's purview and legally permissible.

Further, the applicant's assertion that he was exonerated of wrongdoing by the Credentials Function does not negate the basis for NJP. As noted in AFI 44-119, the role of the Credentials Function is to assess clinical competence, not to determine the appropriateness of administrative or punitive actions. The applicant's conscious failure to review patient referral records over a sustained period—despite his awareness of the requirement to do so—constitutes a willful dereliction of duty. The advisory opinions establish that the applicant's conduct was inconsistent with AFI 44-176 and exposed the Air Force to potential patient safety and liability risks.

Regarding the claim of mental health conditions as a mitigating factor, the Board finds persuasive the analysis of the AFRBA Psychological Advisor. The record reflects no diagnosed mental health condition prior to or during the timeframe of the misconduct. The diagnosis of an adjustment disorder occurred post-misconduct and appears to have been precipitated by the consequences of the administrative actions, not a pre-existing condition affecting duty performance. Even assuming *arguendo* that a mental health condition had existed contemporaneously, the evidence does not demonstrate a nexus sufficient to excuse or mitigate the willful dereliction described in the Article 15.

With respect to allegations of whistleblower reprisal, the Board considered the requirements of 10 U.S.C. § 1034 and AFI 90-301. While the applicant stated he filed an IG complaint, the complaint was determined to be a command issue and referred accordingly. The applicant has not provided credible evidence that a protected communication was a motivating factor for the adverse personnel actions taken. The Board finds no basis to conclude the NJP or referral OPR were imposed in reprisal for protected disclosures. The investigative record does not support such a conclusion.

With regard to the referral OPR, the Board finds no error or injustice. The referral was predicated upon substantiated misconduct addressed by the NJP, and the OPR appropriately referenced the underlying behavior rather than the NJP itself, as prescribed by AFI 36-2406. The applicant has not provided evidence that the OPR was inaccurate, unsubstantiated, or not rendered in good faith by the rating chain. Moreover, the applicant did not appeal the contested report to the ERAB, nor did he present statements from rating officials or independent findings refuting the report's validity.

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The Board notes that it is not an investigative body, and the applicant bears the burden of proof. Absent documentation of error, injustice, or evidence not previously considered, the Board must rely on the presumption of regularity in the actions of military officials. The applicant has not presented such evidence. 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, paragraph 2.1, considered Docket Number BC-2024-02271 in Executive Session on 16 Apr 25:

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, Panel Chair

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, Panel Member

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, Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 26 Jun 24.

Exhibit B: Documentary evidence, including relevant excerpts from official records.

Exhibit C: Advisory Opinion, AFRBA Psychological Advisor, dated 6 Dec 24.

Exhibit D: Advisory Opinion, AFPC/DPMS, dated 14 Jan 25.

Exhibit E: Advisory Opinion, AF/JAJI, dated 5 Feb 25.

Exhibit F: Notification of Advisories, SAF/MRBC to Applicant, dated 6 Feb 25.

Exhibit G: SAF/IG Report, various dates, WITHDRAWN.

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.

4/29/2025

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, AFBCMR

Signed by: USAF

**AFBCMR Docket Number BC-2024-02271**

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