



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-03697

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. Removal of the Letter of Reprimand (LOR), dated 10 Apr 23, from his military records, including the Unfavorable Information File (UIF) and his Officer Selection Record (OSR).
2. Removal of any record of relief for cause from Group Command.
3. Removal of the Referral Officer Performance Brief (OPB) from his military records.
4. Any additional relief deemed necessary and appropriate by the Board to correct his military records and restore his career and reputation.

APPLICANT'S CONTENTIONS

On 17 February, his third night in Work-Pr..., he was exhausted from multiple days in the heat and humidity working in tents with variable air conditioning quality at Work-Product AFB, and he was unable to fall asleep. He took Lunesta around 1830-1900 hours and laid down in his bed. On Saturday morning he awoke to find himself on the floor of his room between the balcony door and the bed. He was wearing clothes that he was not wearing when he had laid down to go to sleep. He later found out from one of the Chief Master Sergeants and Colonels that he had left his room, gone down to the hotel restaurant/bar and made some sort of comments that had resulted in a complaint being filed against him. He was advised to return to home station and wait for more information. Ultimately, he discovered that he was being investigated as a criminal subject accused of Sexual Harassment (Article 134 UCMJ) and Conduct Unbecoming an Officer and a Gentleman.

His career has been destroyed due to medical error and it is legal error and clear injustice to allow the adverse actions to stand. Despite clear evidence that he suffered from past adverse reactions, a medical error caused him to be prescribed sleep medication, Lunesta, which had a Black Box warning. Lunesta is known to produce adverse reactions, to include periods of memory loss and reports of erratic behavior in some patients. Before being prescribed Lunesta, back in 2009 he had reported a severe reaction to a similar sleeping medication, Ambien, and unbeknownst to him, Lunesta carried similar risks and was contraindicated based on his medical history.

The fundamentally flawed investigation failed to obtain any credible evidence of misconduct and ignored exculpatory evidence and it was assumed he was voluntarily intoxicated and that alcohol contributed to his behavior. That conclusion is in direct contradiction to the evidence. Specifically, not a single witness observed him consuming alcohol, and his credit card statements

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Controlled by: SAF/MRB

Work-Product

Limited Dissemination Control: N/A

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and along with hotel video prove that he did not purchase any drinks. The MAJCOM/SG, [Work-Pr...], specifically found that the evidence that he was not intoxicated compelling is evidenced by him lining out the word “drunk” in the LOR. Given that, the only explanation for his impaired state was his adverse reactions to the sleeping medication, Lunesta.

Several material errors led to the adverse administrative actions taken. The first and foremost source of material error was the fact that the available evidence unquestionably demonstrated he did not consume alcohol and the behavior was the result of a reactions to medication. In addition, the technical review by Equal Opportunity (EO) was flawed and negatively impacted the outcome of the investigation. The next source of error was the decision by his leadership to ignore the proper legal standard. Rather than applying the applicable preponderance of the evidence standard, the LOR was issued in direct contradiction to the evidence; specifically by striking the word “drunk,” [Work-Pr...] affirmatively determined that the preponderance of the evidence showed he was in fact not drunk. Finally, when the LOR was sustained and he submitted an Article 138 complaint, the Command refused to act on it. This refusal demonstrated a clear error by command and an effort to avoid responsibility for legal errors in this case.

It is clear that his command abused discretion in their arbitrary and capricious decision to issue him the LOR and removing him from command selection. The false allegations giving rise to the to adverse actions arise in the context of a clear failure to carefully consider and evaluate all the facts and circumstances of the case. The alleged misconduct was the result of adverse reactions to medication outside of his control. As a result of the LOR he has lost the ability to serve as a Group Commander, a position for which he was competitively selected for, and LOR and along with the Referral OPB creates a stigma that will impact future promotions and his ability to work for the Department of Defense.

The applicant’s complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is an Air Force Medical Corps colonel (O-6).

On 6 Feb 23, according to military treatment facility clinical notes, the applicant was prescribed “eszopiclone (Lunesta 2 mg oral tablet), 1 tab, oral, every day at bedtime, PRN insomnia, Take one tab hs prn time zone changes, #5 tab(s), 0 refill(s).” *Assessment/Plan*, contains the following statement: “1. Circadian rhythm sleep disorder of shift work typ. Member reports unacceptable side effects with Ambien and Restoril. Member requests either Sonata or Lunesta which, he has taken in the past without noticeable side effects for his TDY to [Work-Pr...]”

On 10 Apr 23, he was issued an LOR by the MAJOM Surgeon General as the result of an investigation that disclosed on 17 Feb 23 his misconduct violated Articles 92, 133 and 134 of the Uniform Code of Military Justice (UCMJ) for the following: While on temporary duty he made inappropriate sexually harassing comments to USAF and Royal Australian Air Force (RAAF) members while he was drunk. Among other comments, he sexually harassed a USAF female field grade officer when he directly stated to her that her “breasts were clearly not getting enough attention” and that “she had clearly tamed the same penis for five years,” or words to that effect. Moreover, he stated to the same female officer and others present that he would “lick a ball sack or vagina,” or words to that effect. During this same interaction, he talked about how a male field grade officer’s “nipples could cut glass,” or words to that effect. He then tried to convince people to go swimming in their underwear, even though all declined to swim. Ultimately, a RAAF member interjected that he had too much to drink and needed to return to his room which prompted

other members to escort him back to his room. On that same date, the applicant acknowledged receipt, that he had three duty days to provide a response, and that if the LOR is sustained it will be placed in a UIF and in his OSR.

On 25 Apr 23, the MAJCOM Surgeon General, upon considering the applicant's response dated 19 Apr 23, lined out the word "drunk" in paragraph one and decided to sustain the LOR and place it with an UIF and in the applicant's OSR. On that same date, the applicant acknowledged the decision.

On 27 Apr 23, according to MAJCOM/JA memorandum, *Ten-Year Retention Rule Exception Memo - <applicant>*, the applicant's LOR meets the exception to the ten-year rule and should remain in his OSR permanently.

On 3 May 23, the applicant submitted an Informal Complaint under Article 138, Uniform Code of Military Justice, document provided by applicant, to the MAJCOM Surgeon General.

On 16 May 23, the applicant provided an Addendum to his LOR response.

In an undated memorandum, *Informal Article 138 Complaint Response*, document provided by applicant, the MAJCOM Surgeon General considered and dismissed the Article 138 complaint for the following reason(s): I am the MAJCOM/SG director and the MAJCOM Command Surgeon, but I am not a commander on G-series orders. Since Article 138 complaints can only be submitted against a commander, your informal complaint is outside the scope of Article 138 pursuant to AFI 51-505, paragraphs 4.2.1 and 1.3.3.1."

On 5 Jul 23, according to MAJCOM/SG memorandum, *Referral Officer Performance Brief*, the applicant was notified his OPB was being referred in accordance with DAFI 36-2406, paragraph 1.10 because it contains negative comments/derogatory information. Specifically, the following comment: "During the reporting period, <applicant> sexually harassed a female junior officer and engaged in disorderly conduct while representing <MAJCOM> at an international exercise" causes this report to be referred. On that same date, according to AF Form 715, *Officer Performance Brief (O-1 thru O-6)*, for the period of 22 May 22 thru 28 Feb 23, the applicant received a Referral OPB. Section, *Leading People*, contains the following: "During this reporting period, <applicant> sexually harassed a female junior officer and engaged in disorderly conduct while representing <MAJCOM> at an international exercise. The form contains a "wet" signature without a date.

On 6 Jul 23, the applicant provided a response to the Referral OPB.

On 13 Jul 23, according to the [REDACTED] Security Forces Squadron *Report of Investigation*, the investigation into alleged violations of UCMJ Article 134, Sexual Harassment, and Article 133 – Conduct unbecoming an officer and gentleman, was closed. The period of investigation was 28 Feb 23 - 13 Jul 23.

On 25 Jul 23, according to memorandum, *Supplemental Service—Referral Officer Performance Brief (OPB)*, the applicant was informed due to page 2 of AF Form 715 being provided on this date, he was being provided an additional three duty days to provide any additional comments or documents to the MAJCOM Commander. Additionally, the applicant was informed that the referral OPB, dated 26 Jun 23, was corrected to reflect the date of 5 Jul 23, the date that the OPB was issued rather than prepared. On that same date, the applicant acknowledged receipt.

For more information, see the applicant's submission at Exhibit A, the excerpt of the applicant's record at Exhibit B and the advisories at Exhibit C and Exhibit F.

APPLICABLE AUTHORITY/GUIDANCE

Air Force Instruction (AFI) 51-505, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice*:

1.3.3. The following matters are expressly not eligible for Article 138 review: 1.3.3.1. Acts or omissions that were not initiated, carried out, or approved by the petitioner's commander;

4.2. Determining Whether Dismissal or Transfer is Appropriate. 4.2.1. If an informal complaint raises a matter outside the scope of Article 138 as outlined in paragraph 1.3.3, the informal complaint should be dismissed and the submission should be returned to the petitioner without a decision on the merits of the wrong alleged. The petitioner must be notified of the specific reason the informal complaint fails to meet the scope of Article 138. (T-1). If the informal complaint is found to be outside the scope of Article 138 because there is an alternate forum to address the alleged wrong, the respondent commander should dismiss the informal complaint and return the submission (including any supporting evidence) to the petitioner and direct the petitioner to the appropriate forum for reviewing the matter. For example, if the requested redress can only be resolved through the Air Force Board for the Correction of Military Records, the respondent commander should inform the petitioner of his/her right to file an application with the Board, in accordance with Air Force Instruction 36-2603, *Air Force Board for Correction of Military Records*.

Department of the Air Force Instruction (DAFI) 36-2907, *Adverse Administrative Actions*:

1.2.1. Adverse information is any substantiated finding or conclusion from an officially documented investigation or inquiry or any other credible information of an adverse nature. To be credible, the information must be resolved and supported by a preponderance of the evidence. **(T-0)** To be adverse, the information must be derogatory, unfavorable, or of a nature that reflects clearly unacceptable conduct, integrity, or judgment on the part of the individual. **(T-0)** Adverse information includes, but is not limited to:

1.2.1.1. Any substantiated adverse finding(s) or conclusion(s) from an officially documented investigation or inquiry, regardless of whether command action was taken as a result (reference [paragraph 1.2.7](#)). **(Note:** While some investigations [e.g., Inspector General, Commander Directed or Equal Opportunity investigations] conclude with substantiated or not substantiated findings, investigations conducted by certain authorities, such as Security Forces or the Office of Special Investigations (OSI), neither substantiate nor refute allegations. Consequently, Security Forces and OSI investigations are not considered adverse information. However, command action taken as a result of information presented in an SF or OSI Report of Investigation is considered adverse information and must be filed in the OSR if a letter of admonishment or higher was issued).

1.2.1.4. LORs.

2.2. Standard of Proof. The Standard of Proof for adverse administrative actions is a "preponderance of the evidence." This standard will be used when evaluating the evidence and every element of the alleged offenses. **(T-1)**

2.2.1. A preponderance of the evidence merely means that it is more likely than not that a fact exists. Preponderance of the evidence is not determined solely by the volume of witnesses or documentary evidence supporting or refuting an allegation. Rather, it is based on the totality of the circumstances, the inherent probability or improbability of the evidence, and a determination as to the weight and significance of the evidence and the credibility of the witnesses.

2.2.2. Consider whether such proof is available before initiating the administrative action. If such proof is lacking, administrative action may be determined legally insufficient and, as a result, could be withdrawn. There is no requirement to prove any allegation beyond a reasonable doubt.

AIR FORCE EVALUATION

AFPC/DPMSSM recommends denying the request. Based on the documentation provided by the applicant and analysis of the facts, there is insufficient evidence of an error or injustice as it pertains to the administration of the LOR and UIF. He was issued a LOR for making inappropriate and sexual harassing comments to Air Force and Royal Australian Air Force members. The applicant provided a written response to the LOR and the issuing authority, after considering the applicant's response elected to downgrade the LOR to a Letter of Admonishment (LOA) and place it in the applicant's UIF.

The commander issued the LOR and established the UIF in accordance with DAFI 36-2907, Chapters 1, 2, and 3 and there is no evidence of procedural deviations that would preclude its filing in the applicant's record. A review by office of the applicant's Master Personnel Record Group (MPerRGp) and Officer Selection Record (OSR) reveals that the LOR along with the applicant's response has been filed accordingly.

The complete advisory opinion is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 26 Feb 25 for comment (Exhibit D), and the applicant replied on 27 Feb 25. In his response, the applicant through counsel contended the advisory opinion fails to address or discuss any of the legal, factual, or procedural errors that occurred. Further, because it contains inaccurate facts and fails to address the primary matters at issue it should have no bearing of the outcome of the Board's decision. It is clear in light of the material error and material injustice present in this case, his command abused their discretion in removing him from command and issuing the LOR.

The applicant's complete response is at Exhibit E.

AIR FORCE EVALUATION

AF/JAJI finds insufficient evidence to recommend relief on the basis of legal error. A rational factfinder could conclude that it more likely than not the alleged misconduct occurred and the resulting LOR was an administrative censure documenting the applicant's violation of standards and was supported by a preponderance of the evidence. Every reasonable inference from the evidence supports the presumption of regularity. All procedural and due process requirements were complied with. While counsel argues the LOR was issued prematurely before the Report of Investigation was complete and with a flawed EO technical review, there is no requirement that an LOR must be based on a formal Security Forces or Office of Special Investigation (OSI)

investigation, and therefore no reason why it cannot be issued on the underlying facts of the report prior to report completion. Likewise, there is no requirement for an EO Technical Review prior to issuing an LOR.

Counsel also argues that the Commander's removal of the word "drunk" from the first paragraph of the LOR, indicates that he found that the applicant had an affirmative defense and that there was no longer an evidentiary basis for the LOR. In his first submission, counsel indicates that the evidence clearly and unquestionably demonstrated the applicant: (1) did not consume alcohol and (2) the behavior was the result of a reaction to medication. However, those facts are not a dichotomy. Based on the evidence, a reasonable factfinder could conclude that the applicant did not consume alcohol yet also conclude the behavior was not a result of a reaction to medication. In his response to the AFPC/DPMSSM advisory, counsel again repeats this argument: "he lined out the word 'drunk' in the LOR. Given that finding, the only explanation for the applicant's impaired state was his adverse reaction to medication." The LOR was not given for his impairment, and except for the word "drunk" in the first line, his impaired state is not mentioned. The LOR was given for inappropriate and sexually harassing comments made to Air Force and RAAF members. A preponderance of the evidence clearly supports that the applicant made these statements. There is no evidence of abuse of discretion in the decision to issue the LOR. In fact, the taped conversations indicates Work-Pro... thoroughly reviewed all of the applicant's submitted material in his decision to maintain the LOR. Lastly, the applicant indicates he was removed from command for cause; however, there is no documentation of this removal in the files provided to this office. As these documents were neither provided by the applicant, they were unable to review for legal error.

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 9 Jun 25 for comment (Exhibit D), and the applicant replied on 1 Jun 25. In his response, the applicant through counsel contends the advisory opinion misrepresents the decision-making process, omits critical facts, and fails to address the Applicant's affirmative defense, the procedural deficiencies in the investigation and EO Technical Review, and the clear abuse of discretion by the decisionmakers. The LOR, Referral OPB, and relief from command were based on material errors and constitute a clear injustice. The decision to issue the LOR, despite overwhelming evidence of a medication-induced adverse reaction, is arbitrary and capricious, lacking any rational connection to the facts and violating the preponderance of the evidence standard. Courts in cases such as *Doe v. Sec'y of Air Force*, No. 3:17-CV-1984-B, 2019 WL 13183173 (N.D. Tex. Apr. 24, 2019), *Wilhelmus v. Geren*, 796 F. Supp. 2d 157 (D.D.C. 2011), and *Langford v. Employees Retirement System*, 73 S.W.3d 560 (Tex. App.—Austin 2002, pet. denied), have reversed similar agency decisions for failing to engage with critical evidence, including medical conditions, and violating due process, and the AFBCMR should do the same here.

Denying relief here would leave him without redress for a manifest injustice, calling into question the very existence of the board established to correct such wrongs. The AFBCMR must act to restore fairness and justice by granting the requested relief.

The applicant's complete response is at Exhibit H.

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 thoroughly reviewing all Exhibits, the Board concludes the applicant is not a victim of an error or injustice. The applicant contends that the alleged misconduct was the result of an adverse reaction outside of his control due to his medication, Lunesta, a sleep aid that was prescribed by a military physician, and not due to intoxication as evidenced by his commander specifically striking out the word “drunk” on the Letter of Reprimand. He further states that in the past he had reported a similar adverse reaction to Ambien, a sleep aid, and was unaware that Lunesta carried similar risks and was contraindicated on his medical record. A review of the applicant’s evidence provides insufficient evidence that would verify this claim. The evidence provided by the applicant reflects a military treatment facility clinical note: “Member reports unacceptable side effects with Ambien and Restoril. Member requests either Sonata or Lunesta, which he has taken in the past without noticeable side effects for his TDY to **Work-Pr...**” Further, the applicant verifies this statement in his memorandum when he himself writes “I informed the physician that I had previously taken Sonata, the third flight approved sleep aid, and Lunesta after the Ambien episode with no side effects.” He asserts that the Commander’s removal of the word “drunk” from the first paragraph of the LOR, indicates that he found that the applicant had an affirmative defense and that there was no longer an evidentiary basis for the LOR, however, although the Board concedes that a reasonable factfinder could conclude that the applicant did not consume alcohol, yet based on the evidence determines the behavior was not a result of a reaction to medication. The preponderance of evidence clearly shows he made the following inappropriate and sexually harassing comments to fellow Air Force and Royal Australian Air Force members. Thus, the Board determines that the LOR was not given for his impairment as his impaired state is not mentioned; the LOR was given for his inappropriate and sexually harassing comments. The Board notes the applicant’s actions displayed poor judgement, lost a level of credibility to lead Airman, and failed to epitomize the culture, care, and respect expected of commanders entrusted to lead Airmen. Furthermore, while the applicant contends the LOR was issued prior to the completion of the Report of Investigation, the Board notes in accordance with AFI 36-2907, when officers are issued an LOR, it requires mandatory filing in a UIF and therefore does not need to be referred to an officer for a response. Thus, the Board unanimously agreed the commander’s decision to issue the LOR and subsequent referral OPB were the correct level of corrective action; legally sufficient; neither arbitrary nor capricious; and the actions taken well with the commander’s authority and that the preponderance of the evidence does not demonstrate an error or injustice warranting removal of the LOR or referral OPB. Lastly, while the applicant contends he was removed from command selection, the applicant has provided insufficient evidence that he was selected for and remove from command consideration, the Board notes that the loss of confidence in an officer’s ability to command, due to a variety of reasons, is sufficient to warrant removal from command or command consideration. Therefore, the Board recommends against correcting the applicant’s record.

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.

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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-2024-03697 in Executive Session on 18 Jul 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 A: Application, DD Form 149, w/atchs, dated 22 Oct 24.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPMSSM, dated 13 Feb 25.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 26 Feb 25.
- Exhibit E: Applicant's Response, dated 27 Feb 25.
- Exhibit F: Advisory Opinion, AF/JAJI, dated 9 Jun 25.
- Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 11 Jun 25.
- Exhibit H: Applicant's Response, received 10 Jun 25.

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.

8/14/2025

X Work-Product
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Board Operations Manager, AFBCMR
Signed by: USAF

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