



**FOR OFFICIAL USE ONLY – PRIVACY ACT OF 1974 APPLIES**

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

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**RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

*Work-Product*

**DOCKET NUMBER:** BC-2020-00283

**COUNSEL:**

*Work-Product*

**HEARING REQUESTED:** YES

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**APPLICANT’S REQUEST**

1. His referral AF Form 707, *Officer Performance Report (Lt thru Col)* rendered for the period 21 Feb 16 thru 20 Apr 17, be declared void and removed from his record.
2. His Letter of Reprimand (LOR), dated 21 Mar 17 an Unfavorable Information File (UIF) be removed from his records.
3. His Report of Investigation [sic] or any allegation from the report be removed from his record.
4. He be given Special Selection Board (SSB) consideration for the Calendar Year 2018 (CY18B) and CY19A Lieutenant Colonel (O-5) Line of the Air Force (LAF) Central Selection Boards (CSBs). In the event, he is not selected for promotion to the grade of O-5, by the SSB, he be considered for selective continuation in the grade of major (O-4).
5. If promoted to the grade of O-5 or selectively continued in the grade of O-4, he be restored to active duty, with all pay and benefits as if he had never left active duty, if he accepts promotion or selective continuation.
6. He be granted enough constructive service credit to allow him to qualify for a 20-year retirement.
7. In the alternative, if not granted constructive service credit to qualify for retirement, he be retired under the Temporary Early Retirement Authority (TERA) and given service credit time he earned up to his involuntary separation.

**APPLICANT’S CONTENTIONS**

The applicant’s complete submission is at Exhibit A.

In a 25-page legal brief, through counsel, the applicant contends the following:

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He is the victim of three significant errors and injustices. First, the Air Force conducted a flawed Commander-Directed Investigation (CDI) that erroneously substantiated a portion of the complaint against him. Second, his rater was pressed to give him a referral OPR, and the entire process took nearly a year from the closeout of the OPR, negatively impacting any remedial efforts. Third, senior officials in his chain of command either were unaware of the impact a LOR, establishment of an UIF, and a referral OPR would have on his career that they gave him bad advice, or they deliberately misled him into meekly accepting the administrative action, knowing they put him in an unrecoverable position.

The CDI initiated by his unit was flawed and should not be considered a trustworthy document. In 2016, a series of complaints were lodged against him by a contract employee working in his unit. The complaint alleged he drank on duty and drank to excess, drove under the influence of alcohol, committed an assault, and was derelict in the performance of his duty. In response, his unit initiated a CDI into the allegations. The investigating officer (IO) based his findings on witness statements or interviews. On 1 Feb 17, the IO published a report, wherein he claimed to substantiate allegations involving drinking on duty, reckless driving, and conduct unbecoming an officer. Based on the results of the CDI, he was given a LOR and an UIF was established. In addition, he was given a referral OPR.

In his CDI, the IO concluded that, based on his assessment of interview statements, two allegations were substantiated. The IO is likely an outstanding Air Force officer who is competent in his career field; however, what he is not, though, is a trained investigator. He may have read an instruction on how to conduct a CDI and received a briefing from the Judge Advocate General's (JAGs) office, but to make career decisions on an outstanding officer based on the report of an amateur is an insult to the trust that military members place in their leadership and is fundamentally unjust.

In any investigation, there will be conflicting statements. The IO must have a way to evaluate the credibility of each witness to conclude as to what evidence is credible and what evidence is not. Typically, that method will include things like the plausibility of the witness statement, demeanor, corroboration of the witness story, past history of the witness, and the witness's motive. In fact, The Secretary of the Air Force, Office of the Inspector General, Complaints Resolution Directorate produces a CDI Guide. This guide tells the investigator to remember "The Three C's" of analytical thinking – credibility, corroboration, and clarity. Addressing credibility, the guide says the investigator must assess things like witness bias, motive to lie, and veracity. However, little in the CDI report demonstrates the IO used any of these criteria to evaluate testimony. The IO was aware of the bias of the main complainant, yet he started out his investigation clearly in her corner. Nowhere in his report does he indicate the complainant is biased against him and that he evaluated her testimony with that caveat in mind.

Only two witnesses had anything negative to say about him. One of the other witnesses, who the IO interviewed, was also removed from the contract supporting his projects and was terminated from the company. The IO credits her statements without any indication he understands or is even aware of her obvious motive of revenge against him. In his report, the IO simply accepts the allegation as fact.

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The IOs failure to conduct an investigation that was up to the standard that would be required to take action against a service member, the Board should consider the report unreliable and disregard it. Once the Report of Investigation is disregarded, the rest of the case against the applicant simply collapses. The flawed investigation could not justify a LOR. The investigation did not truly substantiate any allegation and without the substantiation, there is nothing to reprimand him for. Without the LOR, there would have been no UIF, nor would there have been a referral OPR. Without the referral OPR, he would have met his In-the-Promotion-Zone (IPZ) O-5 board with a history of performance reports that consistently rank him well within the top 20 percent of his peers. While it is likely he would have received a “Definitely Promote,” even with just a “Promote” a top 20 percent major would have been selected for O-5. A flawed and inexpert Report of Investigation caused him to be non-selected for promotion and that is both unfair and unjust.

His organization acted in contravention of Air Force Instructions (AFI) in giving him a referral OPR. His leadership failed to follow AFI while giving him a referral OPR. Specifically, AFI 36-2406, *Officer and Enlisted Evaluations Systems*, paragraph 1.4.4.5., states, “referral OPRs are due in the Automated Records Management System (ARMS) no later than 60 days after the close-out date. His OPR closed out on 20 Apr 17. Therefore, his OPR should have been completed and placed in ARMS no later than 19 Jun 17. However, his OPR was not completed until Mar 18. During this time, his rater felt pressured to change his rating from “Meets Standards” to “Does Meet Standards,” which resulted in a referral OPR.

His rater intended to write an OPR that was as glowing as the previous year’s report; however, when his rater submitted the OPR to the additional rater, he was informed that based on the investigation and LOR, the applicant could not be rated as “Meets Standards.” Based on that conversation, his rater felt forced to abandon the rating he wanted to give and changed his rating to “Does Not Meet Standards,” which initiated a referral process.

His organization failed to correctly inform his rating chain about the referral process. As a result, his OPR went through several drafting procedures because incorrect blocks were checked, there was uncertainty as to who the referring official was supposed to be, and it was unclear who was supposed to sign where. Additionally, the completed report was returned from the Air Force Personnel Center (AFPC) to correct other errors. He signed what was supposed to be the receipt of the final version of the referral OPR on 31 Aug 17, 15 Feb 18, and 14 Mar 18.

The lack of control and understanding of the referral process by his leadership resulted in an error in his official personnel file and the record that met the promotion board. His official record and promotion folder for the CY18B O-5 promotion board contained the OPR that was acknowledged by him on 15 Feb 18. On 6 Mar 18, he was presented with a revised OPR and on 12 Mar 18, he provided a rebuttal.

There is no explanation regarding why the OPR he acknowledged on 14 Mar 18 was needed or why it was not placed in his official personnel file. He met the CY18B board with a flawed personnel file. The OPR that met the board is not the OPR he provided rebuttal comments. Whether or not those comments swayed the reviewer is immaterial. The failure to place the true final OPR in his official personnel file was an error that negates the results of the promotion board.

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In addition, to causing a discrepancy in his records regarding what should be the “official” OPR, these delays had a negative impact on his ability to demonstrate that he overcame the situation, which caused the referral OPR by having subsequent OPRs in his record testifying to that fact before his promotion board met. Given a 20 Apr 17, close-out of his referral OPR, his leadership could have generated an evaluation “to document significant improvement in duty performance,” in accordance with AFI 36-2406, table 3.2, rule 9. That OPR could have closed out on or about 20 Aug 17. In addition, his unit could have then generated an OPR based on a change of reporting official that would have closed out at the end of Dec 17.

Finally, his unit could have generated a third OPR that would have closed out in April 18, in time for the CY18B O-5 promotion board. He could have had three outstanding OPR’s in his file that were written since the referral OPR. This would have been a strong signal to the board that his leadership believed he conquered any issues he may have had, confirming the comments made in an OPR and Promotion Recommendation Form (PRF). This could have been the difference between promotion and non-selection at that board or the CY19A board. It could also have been the difference between selective continuation and non-selection for selective continuation, after he was twice passed over for selection to O-5. Without a completed OPR in ARMS, though, generating these new OPRs would have been stymied by the system. The unwarranted delay in processing his referral OPR prevented the ability to present a more positive picture to the promotion board.

His leadership improperly advised him to accept a LOR, implying it would have no impact. When he was presented with the LOR, he was, naturally, unsure of his response. He received advice on how to respond from several people; among them was his immediate supervisor. Specifically, his supervisor informed him that leaderships position was that he needed to “take responsibility and everyone could move on.” Even the investigating officer told him, his career would be fine.

According to his rater, the discussions about the CDI and the actions thereafter took place between the Director of Operations and Deputy Director. It is likely that neither man understood the ramifications of a LOR an UIF to the career of an Air Force officer.

According to the Navy’s Manual of the Judge Advocate General (JAGMAN), chapter 1, part A section 0102: “Commanders are authorized and expected to use administrative corrective measures to further the efficiency of their commands or units. These measures are not to be imposed as punishment for any military offense(s). They may be administered either orally or in writing. They generally fall into three areas: extra military instruction, administrative withholding of privileges, and nonpunitive censure.”

Further, JAGMAN states: “Nonpunitive censure may be issued by any superior in the member's chain of command and may be either orally or in writing. A nonpunitive letter is not considered punishment; rather, the letter is issued to remedy a noted deficiency in conduct or performance of duty. A nonpunitive letter will be kept a personal matter between the member and the superior issuing the nonpunitive letter. Other than Secretarial letters of censure, the letter may not be forwarded to the Chief of Naval Personnel or the Commandant of the Marine Corps, quoted in or appended to fitness reports, included as enclosures to investigations pursuant to the Manual of the

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Judge Advocate General or to other investigations, or otherwise included in official departmental records of the recipient.”

In the LOR, Rear Admiral ----- specifically states that the letter is imposed as an administrative measure and not as punishment. Therefore, based on his naval service, it is reasonable to believe that Rear Admiral ----- did not expect this would generate a negative performance report, as a nonpunitive censure in the Navy is between the member and superior issuing it.

The likelihood that Rear Admiral ----- and retired Coast Guard Rear Admiral ----- were not fully aware of the impact of the LOR an UIF is buttressed by the advice people in supervisory positions gave to him. Specifically, he asked his supervisor, what he should do regarding the LOR and was informed that leadership wanted him to accept responsibility and then “everyone could move on.”

In his mind, moving on meant that the recommendations in the IOs CDI report would be followed. The report suggested he take courses in communication and self-refer to the Air Force’s Alcohol and Drug Abuse Prevention and Treatment (ADAPT) program. Trusting in his leadership, he entered the ADAPT program, which determined he “did not meet the Diagnostic and Statistical Manual (DSM) 5 criteria for the diagnosis of any substance or alcohol use disorder.” This fact alone completely refutes the report on which the LOR and referral OPR are based.

Despite putting his faith in his leadership, it is clear that neither the non-Air Force military leadership nor the civilian leadership understood the reality that a LOR an UIF that generates a referral OPR, that is signed a couple of months before a promotion board signifies the end of an Air Force officer’s career. Their lack of understanding is important, because if they truly understood the ramifications of a LOR and still took the actions they did, then their behavior would be reprehensible. Knowing they effectively killed his career, his unit continued to send him on temporary duty (TDY) assignments to install bio-surveillance systems, move him into positions of greater responsibility and put him in charge of larger teams, assure him that his career would not suffer, wringing whatever they could out of him while dangling before him a carrot of redemption they knew he would never get.

The applicant’s complete submission is at Exhibit A.

**STATEMENT OF FACTS**

The applicant is an honorably discharged Air Force major (O-4).

According to the documentation provided and analysis of the facts, the following information is provided:

On 1 Dec 16, the applicant’s unit commander initiated a CDI into allegations of drinking on duty, driving while under the influence, dereliction of duty, assault, and conduct unbecoming an officer.

**Allegation 1:** The applicant on multiple occasions, drove an automobile under the influence of alcohol and in a drunken and/or reckless manner, in violation of the UCMJ, Article 111 (Drunk or Reckless Operation of a Vehicle) and Article 112 (Drunk on Duty).

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FINDING: NOT SUBSTANTIATED.

**Allegation 2:** The applicant on eight occasions, consumed alcohol to excess so that it impaired his work performance or conduct, in violation of applicable laws, rules, regulations, or policies. FINDING: **SUBSTANTIATED.**

**Allegation 3:** The applicant on 29 Oct 16 between 0800L and 0815L committed an “offer type assault” against a contractor in violation of Article 128 (Assault). FINDING: **NOT SUBSTANTIATED.**

**Allegation 4:** The applicant on multiple occasions, made unprofessional statements and treated subordinates in an unprofessional manner which should be considered to be conduct unbecoming an officer and gentleman, in violation of Article 133 (Conduct Unbecoming an Officer and Gentleman), AFI 1-1, *Air Force Standards*, the Cooperative Threat Reduction (CTR) Travel Standards of Conduct, and Article 92 (Failure to Obey a Regulation and/or Dereliction of Duty). FINDING: **SUBSTANTIATED.**

On 21 Mar 17, the applicant was issued a LOR. The reason for the LOR states, “an investigation disclosed that on diverse occasions between 1 Jul 15 and 30 Nov 16, while traveling for TDY purposes, in the Continental United States (CONUS) and overseas, you consumed alcohol to excess such that it adversely affected your duty performance or conduct and on several occasions it necessitated cancelling or rescheduling meetings. The investigation further disclosed that on these and other occasions you behaved in a manner that compromised your character as an officer and gentleman. Such conduct is a violation of the Uniform Code of Military Justice (UCMJ) Article 92, Dereliction of Duty, such duty described in Air Force Instruction 1-1, paragraph 2.7, and Article 133, Conduct Unbecoming an Officer and Gentleman. Subsequently, on 21 Apr 17 an UIF was established.

On 6 Mar 18, the applicant was issued a referral OPR for the period 21 Feb 16 thru 20 Apr 17. Specifically, sections III, *Performance Factors* and IX, *Performance Factors*, Items 3, *Professional Qualities* and 5, *Judgment and Decisions*, were marked as “Does Not Meet Standards.”

On 31 Dec 19, the applicant was discharged, with narrative separation of separation of Non-Selection, Permanent Promotion and credited with 16 years, 10 months, and 10 days of total active service.

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

**APPLICABLE AUTHORITY/GUIDANCE**

AFI 36-2907, *Unfavorable Information File (UIF) Program* paragraph 1.1. The UIF is an official record of unfavorable information about an individual. It documents administrative, judicial, or non-judicial censures concerning the member’s performance, responsibility, and behavior.

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Paragraph 2.1.8. Officer UIF may be removed early if the following document(s) used to establish the UIF is removed:

2.1.8.1. Court-Martial Order. The removing authority is the wing commander (or equivalent) or convening authority, whichever is higher, and the punishment must be completed prior to early removal.

2.1.8.2. Article 15. The removing authority is the wing commander (or equivalent) or imposing commander, whichever is higher, and the punishment must be completed prior to early removal.

2.1.8.3. LOR, Letter of Counseling (LOC), Letter of Admonition (LOA), or Control Roster placement. The removal authority is the wing commander (or equivalent) or their designee or issuing authority, whichever is higher.

Paragraph 2.5. Removal of UIFs or their Documents.

2.5.1. Commanders maintain the UIF and all of its documents/contents until the final disposition date unless early removal of the document or UIF is clearly warranted. Commanders initiate removal action via AF Form 1058, UIF Actions or memorandum, and the individual should acknowledge the action.

2.5.2. UIF monitors:

2.5.2.2. Remove UIFs (enlisted or officer) when the commander, after consulting with the serving Staff Judge Advocate (SJA) and reviewing the members rebuttal, determines did not commit the offense listed in the LOR, LOA, or LOC.

2.5.2.3. Remove UIFs (officer only) upon receipt of an AF Form 1058, or memorandum signed by the officer's wing commander (or equivalent), imposing, or issuing authority, whichever is higher. Courts-martial and Article 15 documents may be removed early only once the punishment is completed.

2.5.2.5. All other UIF entries may be removed early regardless of how long the UIF was on file in the system by the wing commander (or equivalent) or issuing authority, whichever is higher for officers and by the unit commander or higher for enlisted members.

4.4. LORs. A reprimand is more severe than a counseling or admonition and indicates a stronger degree of official censure. Commanders may elect to file a LOR in an UIF for enlisted personnel. LORs are mandatory for file in the UIF for officer personnel.

According to Air Force Instruction 36-2501, *Officer Promotions and Selective Continuation*, Special Selection Boards (SSBs) are convened to consider officers who were improperly considered, or not considered, by one or more promotion boards. The Air Force Board for Correction of Military Records (AFBCMR) or a federal court can direct an officer for

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consideration by an SSB. SSB consideration is based on legal, administrative, and material errors. An SSB will not be considered if, by exercising reasonable diligence, the officer should have discovered the error or omission and could have taken corrective action before the originally scheduled board convened.

In the National Defense Authorization Act for Fiscal Year 1993 (FY93 NDAA), Public Law (PL) 102-484, 23 Oct 92, Congress enacted the Temporary Early Retirement Authority (TERA), which permitted selected military members to retire early. Section 534 of that law gave the Secretary of Defense authority to allow the Service Secretaries to permit early retirement for selected military members having more than 15 but less than 20 years of active service. Public Law 107-314, National Defense Authorization Act for Fiscal Year 03, Section 554, extended TERA to 1 Sep 02 at which time that TERA authority expired.

**AIR FORCE EVALUATION**

AFPC/DP3SP, recommends denying the applicants request that his referral OPR for the period 21 Feb 16 thru 20 Apr 17, be declared void and removed from his records. Based on the analysis of the facts and documentation provided, the applicant has provided insufficient evidence to substantiate an error or injustice in regards to the contested OPR.

The applicant filed an Evaluation Review and Appeals Board (ERAB) application; however, the ERAB was not convinced of an error or injustice based on the documentation provided, and therefore, denied the applicant's request to void the OPR. The applicant received a referral OPR with the following comment: "Unprofessional conduct w/contractors; alcohol consumption adversely impacted judgement on duty – LOR received." The applicant through counsel states his rater was pressured to give him a referral OPR, and the referral OPR took over a year to be finalized and placed in the applicant's official military record. However, there is insufficient documentation from the rating chain to assert the rater was forced to change his rating and give the applicant a referral OPR. Specifically, AFI 36-2406, states "Evaluators should discuss disagreements when preparing evaluations. Preceding evaluators are first given an opportunity to change the evaluation; however, they will not change their evaluation just to satisfy the evaluator who disagrees. If, after discussion, the disagreement remains, the disagreeing evaluator marks the "non-concur" block and must provide specific comments in their block to explain each item in disagreement prior to commenting on any performance." Therefore, the rater had the option to not refer the OPR, and the additional rater could have "non-concurred" with the rating and then referred the OPR. Ultimately, the rater chose to refer the OPR.

The applicant through counsel contends, his rating chain was unaware of how to properly accomplish the OPR, resulting in the routing of numerous draft reports. This appears to be the reason for the delay in processing his final OPR; however, the delayed processing does not negate the behaviors resulting in the referral OPR did not occur.

The complete advisory opinion is at Exhibit C.



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AFPC/DP2SP recommends denying the applicant's request for SSB consideration, indicating that DP3SPE [sic] concluded the applicant provided insufficient evidence to substantiate an error or injustice in regards to the contested OPR.

The applicant was non-selected to the grade of O-5 by the CY18B In-the-Promotion Zone (IPZ) and CY19A Above-the-Promotion Zone (APZ) O-5 Line of the Air Force (LAF) Central Selection Board (CSB). In addition, he was not selected for continuation after the CY19A CSB, which was his second non-select to the grade of O-5.

The complete advisory opinion is at Exhibit D.

**APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent copies of the advisory opinions to the applicant on 11 Jan 21 for comment (Exhibit E), and counsel replied 29 Mar 21. Counsel reiterates the applicant's original contentions and lists three significant injustices perpetrated upon him by the Air Force. First, the CDI that was initiated against the applicant was significantly flawed and should not have been used as a basis for disciplinary action. Second, as a result of the conclusions made by the flawed investigation, the applicant was given a LOR that led to a referral OPR – one his rater did not want to give but was pressured into giving by his superiors within the organization, and one that was administratively mismanaged to his detriment. Third, the senior leadership in the applicant's organization misrepresented the impact that accepting the LOR would have on his future in the Air Force. These leaders either did so willfully, or due to the fact that the LOR was issued by a member of the naval service, they did not understand the ramifications of a LOR to an airman's career.

The Board received two advisory opinions:

The first from AFPC/DP3SPE [sic], this opinion only addresses the applicant's request to have the referral OPR removed from his records. In addition, the opinion only addresses that request from the question of whether or not the rater was pressured to write the referral OPR.

The second from AFPC/DP2SP, this advisory addresses the applicant's request to meet a SSB for promotion to Lt Col. The extent of this opinion is to recommend that, if the Board denies the request to remove the OPR then the Board should deny the request for an SSB.

However, there is no opinion that addresses the applicant's charge that the CDI itself was flawed. Therefore, one can only interpret that to mean the Air Force does not defend the CDI, given that AFI 36-2603, *AFBCMR* allows the Board to ask for an advisory opinion from ANY Air Force official or organization and the applicant has provided sufficient and credible evidence regarding the incompetent nature of the CDI. The Air Force has made no effort to refute that evidence. This is important because the CDI forms the basis for everything that happened subsequently. Without the CDI, there would be no LOR. Without the LOR, there would be no referral OPR. Without the referral OPR, the applicant would have been promoted to Lt Col, given his continued stratification in the top 10 to 20 percent of his contemporaries.

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The advisory opinions the Air Force did provide, are both flawed. With respect to the second advisory opinion first, it merely recommends that, if the OPR is not set aside, then no SSB should be held. There is no analysis performed of the applicant's claims; therefore, it seems useless. The first advisory opinion, though, has significant shortcomings. Specifically, it refers to the ERAB response provided to the applicant:

“The board was not convinced there was an error/injustice. Although the original rater indicates the desire not to referral [sic] the evaluation, appears there was [sic] discussions on the topic and the end result was the rater did in fact refer the evaluation. In the absence of input from the entire rating chain, not just the rater, the board is not convinced there was an error/injustice and therefore denies the applicant's request to void the subject OPR.”

The advisory opinion quotes AFI 36-2406, which explains that raters who disagree should discuss the disagreement and if it cannot be resolved, then the subsequent rater should mark the non-concur block. A review of the applicant's original ERAB submission and the reply, though, shows the rater attempted to do exactly what the regulations require but was pressured by his senior leadership and other administrators to go along with the referral OPR. His rater did not want to write a referral OPR. However, it was the command section that directed him to be the referring official on the OPR, despite his objections and his demonstrated intent to provide the applicant with a positive OPR. It is evident that senior leadership was illegally, unfairly, and unjustly pressuring the applicant's rater to something he did not want to do.

The advisory opinion that AFPC/DP3SP provided did not address the applicant's statement that the OPR that was in his promotion file was not the OPR that he commented on. Instead, the advisory opinion states “the rating chain was unaware of how to properly accomplish the OPR resulting in the routing of many draft reports. This is the apparent reason for the delay in processing the final OPR in the official record. However, the delayed response does not negate the behavior resulting in the referral OPR did not occur.” The reason for so many drafts was not simply that “the rating chain was unaware of how to properly accomplish the OPR.” The reason for so many drafts was that senior leadership bullied the applicant's rater into becoming the referral official against his express wishes.

Next, the advisory opinion fails to account for the fact the OPR that was in his promotion folder was not the OPR that was presented to him for comment nor was it the “final OPR.” Those OPRs have significant and substantial differences in the comments section for the rater. In addition, he was never afforded the opportunity to comment on the OPR that was in his promotion folder; thus, the promotion selection process for his first eligibility for promotion to Lt Col was fundamentally flawed.

Regarding the lack of an advisory opinion for the CDI, the flaws outlined in the original application served to deprive the applicant of his Fifth Amendment right to due process. As noted in the Constitution, “No person shall be deprived of life, liberty, or property, without due process of law.”

Under 10 USC, Section 1161:

“(a) No commissioned officer may be dismissed from any Armed Force except -

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- (1) by sentence of a general court-martial;
- (2) in commutation of a sentence of a general court-martial; or
- (3) in time of war, by order of the President.”

The law does not allow for commissioned officers in the grade of major and below to be discharged after having been twice non-selected for promotion to a higher grade (10 USC, Section 632). Therefore, the applicant had a property right to continued employment up until the time he was non-selected for promotion the second time. By virtue of that property right, he was entitled to procedural due process as a Fifth Amendment right. In general terms, procedural due process means an administrative process must provide a person with notice, the opportunity to be heard, and a decision by a neutral decision-maker. The applicant was denied due process because the procedure the Air Force used to determine the validity of any allegation against him, the CDI, was fundamentally flawed and any decision flowing from the CDI is invalid. The CDI in this case violated Air Force guidance and unjustly influenced the decision-maker, negating any neutrality. The Air Force Inspector General publishes a “CDI Guide.” The guide is designed to provide “procedures for commanders and their investigative teams can use to conduct **prompt, fair and objective investigations.**” According to the Guide, the role of the IO in a CDI is to perform a “**fair and impartial**” investigation and to be “**objective, neutral and fair.**” The IO did not perform a fair and impartial investigation, nor was he objective, neutral and fair.

In addition to the incompetent investigatory skills shown by the IO, as noted in pages 7-18 of the original application to the Board, further evidence of his bias and partiality exists throughout his report. By failing to ensure the process used to investigate the applicant was fair and impartial, the Air Force deprived him of his constitutionally protected right to procedural due process in violation of the Fifth Amendment. The IO inappropriately shifted from being a fair and impartial reporter to being an advocate for his biased beliefs about the applicant’s behavior – beliefs that were not supported by fact and beliefs that would have been proven incorrect had the IO investigated rather than deciding to champion a particular position.

The advisory opinion failed to address the flawed CDI and failed to address the contention that the applicant’s senior leadership did not understand the results a LOR would have on an Air Force officer’s career. While the advisory opinion partially addressed the contention the referral OPR was improperly issued, it failed to examine the rater’s submissions he was forced to write the referral against his wishes. It also failed to address the OPR that was in the applicant’s promotion folder was not the OPR to which he made his rebuttal comments.

The entire process surrounding the applicant’s non-selection for Lt Col is rife with errors from an over-zealous investigator-turned advocate to senior leaders who were unaware of the consequences of their actions to staff members who apparently did not want to undertake a process outside the organizational norm to a rater pressured to take an action he did not want to take. As such, the applicant should be granted the relief requested.

The applicant’s complete response is at Exhibit F.

**FINDINGS AND CONCLUSION**

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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 found no evidence the applicant's contested Officer Performance Report was unjust and wrong. After a lengthy and thorough consideration of the documentation, statements, and contentions presented we find no evidence the applicant's contested OPR is not a true and accurate assessment of his demonstrated potential during the specified period or that comments contained in the report are in error or contrary to the provisions of the governing instruction. The applicant contends his rater was pressured into giving him a referral OPR; however, the Board disagrees. Specifically, as noted in AFI 36-2406, *Officer and Enlisted Evaluations System*, evaluators are given an opportunity to change the evaluation; however, they will not change their evaluation just to satisfy the evaluator who disagrees. If, after discussion, the disagreement remains, the disagreeing evaluator marks the "non-concur" block and must provide specific comments in their block to explain each item in disagreement prior to commenting on any performance. Therefore, the rater had the option to not refer the OPR, and the additional rater could have "non-concurred" with the rating and then referred the OPR. However, the rater chose to refer the OPR.

Additionally, the applicant asserts his rating chain was unaware of how to properly accomplish the OPR, resulting in the routing of numerous draft reports. While this appears to be the reason for the delay in processing his final OPR; however, the delayed processing does not negate the behavior resulting in the referral OPR did not occur. Therefore, the Board concurs with the rationale and recommendation of AFPC/DP3SP and find a preponderance of the evidence does not substantiate the applicant's contentions.

The applicant also contends senior officials in his chain of command were unaware of the ramifications of a LOR or UIF to the career of an Air Force officer; however, the Board finds this statement disingenuous at best. Specifically, the Board finds it hard to believe senior officers, regardless of branch of service would not understand the ramifications a LOR/UIF would have on an officer's career. Further, the Board unanimously agreed the LOR/UIF was the correct level of corrective action and finds it was within the commander's authority and the evidence presented does not demonstrate an error or injustice warranting removal of the LOR/UIF or that it was unjust or inaccurate as written. In addition, the Board notes the applicant's actions displayed poor judgment and failed to epitomize the culture, care, and respect expected of officers, since we find no error with the contested OPR, there exist no basis upon which to direct the removal of the LOR/UIF. The applicant contends the investigative process was flawed and unjust; however, he has provided insufficient evidence to substantiate the investigation was not conducted in accordance with both the DAFMAN 1-101, *Commander Directed Investigations* and CDI Guide, dated 1 Jun 18, and therefore, should be removed from his record. Given there is no basis to void the applicant's contested OPR, his requests for Special Selection Board consideration; be restored to active duty with all pay and benefits; be granted constructive service credit to qualify for a 20-year retirement; and be retired under TERA are not favorably considered. Moreover, while the applicant believes the evidence should be considered in a manner he desires, the Board's decision was neither arbitrary nor capricious and was based on the evidence provided. Therefore, the Board recommends against correcting the applicant's records.

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

**RECOMMENDATION**

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

**CERTIFICATION**

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2020-00283 in Executive Session on 28 Jan 21, 24 Jun 21, and 30 Apr 24:

- 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 24 Feb 20.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory opinion, AFPC/DP3SP, dated 26 Jul 20.
- Exhibit D: Advisory opinion, AFPC/DP2SP, dated 11 Jan 21.
- Exhibit D: Notification of advisory, SAF/MRBC to applicant, dated 11 Jan 21.
- Exhibit E: Applicant’s response, dated 29 Mar 21.

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.

10/10/2024

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