

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02405

XXXX X. XXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. His Letter of Admonishment (LOA) dated 28 Feb 19 be removed from his military records.
2. He receive Special Selection Board (SSB) consideration.

APPLICANT'S CONTENTIONS

In accordance with AFI 36-2907, *Adverse Administrative Actions*, para 2.4.6.1.3., he has petitioned the appropriate authority within his current chain of command to rescind the LOA. After they reviewed the complete LOA package and the rescission letter of recommendation from the initial imposing authority, it was determined rescission is appropriate. The decision was made by his current appropriate authority and supported by his initial imposing authority. He took the correct actions after he was advised from the Wing Judge Advocate, where new evidence was provided to him, and he closed out an Enlisted Performance Report (EPR) in referral status and lined out the nomination for a Wing Commanders Action Group (CAG) position. Letters of recommendations are attached from his current appropriate authority and his initial imposing authority approving the rescission of the LOA and the corresponding removal from his Personnel Information File (PIF) and electronic Officer Selection Record (eOSR).

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a currently serving Air Force lieutenant colonel (O-5).

On 28 Feb 19, an LOA, indicates that his commander admonished him for events that occurred on Jan 19 when he failed to seek adequate legal counsel as required by AFI 51-202, *Nonjudicial Punishment*, para. 5.2 before attempting to set aside an Article 15 imposed by another commander, and he also failed to properly adhere to the requirements of AFI 36-2406, *Officer and Enlisted Evaluation Systems*, para. 1.10.3.1, in that he attempted to close out a non-referral EPR on the same member. Additionally, he nominated the same individual to serve on the CAG. On that same day, the applicant acknowledged receipt of the LOA.

On 8 Mar 19, according to a response to the LOA, the applicant provided his rationale for his actions. Additionally, he received legal advice on the situation where new evidence was provided and he decided to shred the set aside paperwork, move forward with a full referral EPR, and remove the CAG nomination. On 14 Mar 19, the applicant's commander decided to retain the LOA.

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

APPLICABLE AUTHORITY

On 26 February 2021, the Secretary of the Air Force ordered a policy change via a Department of the Air Force Policy Memorandum (DAFPM) 2021-36-03 on Adverse Information for Total Force Officer Selection Boards to comply with Section 502 of the National Defense Authorization Act (NDAA) for Fiscal Year 2020, signed on 20 December 2019, as codified in title 10 United States Code, section 615(a)(3).

The new law, DoD policy, and subsequent Air Force policy require all adverse information to be filed in the officer's master personnel records group and Officer's Selection Record for consideration by both regular and reserve promotion selection, special selection, federal recognition, and selective continuation boards to the grade of O-4 and above, to include promotion processes to the grade of O-3 that involve adverse information that received significant media attention or is of interest to the Senate Armed Services Committee. These changes came into effect for all promotion boards convening on or after 1 Mar 2020 and include historic adverse information previously issued on or after 1 Jan 12 and Article 15s and approved court martial findings dated prior to 1 Jan 12. It further removed the authority for Wing commanders, delta commanders, or issuing authorities to direct removal of derogatory data from the OSR as previously permissible in AFI 36-2907, Adverse Administrative Actions, paragraph 3.4.3.1, and AFI 36-2608, Military Personnel Records, paragraphs 7.10 through 7.12 (and their subparagraphs), 8.3.8, and 8.3.15 (and its subparagraphs). Adverse information that requires mandatory filing in the Officer Selection Record (OSR) and the Master Personnel Records Group (MPerRGp) includes, but is not limited to:

1. Any substantiated adverse findings or conclusions from an officially documented investigation or inquiry, regardless of whether command action was taken as a result.
2. Approved court-martial findings of guilt (Court-martial Orders).
3. Non-judicial punishment pursuant to Article 15, Uniform Code of Military Justice.
4. Letters of Reprimand.
5. Letters of Admonishment.
6. Notices of Relief of Command (for cause).
7. Letters of Counseling related to a substantiated adverse finding or conclusion from an officially documented investigation or inquiry.

LOCs unrelated to a substantiated finding or conclusion from an officially documented investigation or inquiry will not be considered adverse information. This preserves commanders' ability to administratively document and rehabilitate minor instances of substandard behavior or misconduct without making it a part of the permanent record (also referred to as "standalone" LOCs).

Moreover, the DAFPM states that "waivers to this policy are not permitted" and all adverse information as defined by the policy will be permanently placed in the MPerRGp. Except for the

set aside of a court-martial or nonjudicial punishment action, removal of adverse information from the MPerRGp may only be directed pursuant to an Air Force Board for Correction of Military Records (AFBCMR) recommendation.

As such the AFBCMR is now the sole removal authority for adverse actions. This is not a different type of review for the AFBCMR. Rather, it falls under the Board's existing review authority for corrections resulting from error or injustice.

Note on Supplemental Selection Boards (SSB): In accordance with title 10, USC sections 628(a)(2), 628(b)(2), 14502(a)(2), and 14502(b)(3), special selection boards considering promotion boards prior to the implementation of this policy will consider the record as it would have appeared to the original board. Historic adverse information will not be presented to the promotion board via the OSR for officers meeting an SSB considering an original board prior to the implementation of this policy.

AIR FORCE EVALUATION

AFPC/DP2SSM recommends denying the applicants LOA removal request. IAW the National Defense Authorization Act, Title 10 USC Section 615(a)(3), the LOA meets the requirements of adverse information and was filed in the applicants MPerRGp and OSR. Based on the documentation provided by the applicant and analysis of the facts, there is not evidence of an error or injustice. The applicant's commander issued an LOA based on the preponderance of evidence IAW AFI 36-2907.

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 7 Mar 22 for comment (Exhibit D), and the applicant replied on 6 Apr 22. At the time of issuance, he was informed by the initial imposing authority that the adverse information would not be filed in his OSR or PIF, but due to a recent policy change in Feb 21, historic adverse information would now be included in eOSR's. Since the adverse information was not filed in his PIF, he was under the impression that the adverse action would be destroyed in accordance with Air Force Records Information Management System (AFRIMS) Table, 36 – 12 Rule 02.00, *Personnel Information File (PIF)*, disposition: "Retain in the office file until superseded, no longer needed, separation, or reassignment of the individual on PCA or PCS." Note 373 states, "On intercommand reassignment (PCA or PCS) the file is given to the individual or destroyed. On intracommand reassignment (PCA or PCS), the file is given to the individual, forwarded to the gaining commander, or destroyed." He completed an intercommand reassignment, Permanent Change of Station (PCS), to his current assignment but never received the file as nothing was filed in his PIF and believed it to be destroyed. The initial imposing authority chose not to establish an Unfavorable Information File (UIF), never placed him on a Control Roster, nor issued him a referral performance report as a result of the adverse action.

During the year the adverse action was administered, he maintained exceptional duty performance throughout and received favorable recommendations for higher level positions. Additionally, he has received a #1 stratification on his most recent performance evaluation from his rater and additional rater to include a #4/70 Lt Cols stratification from the Major Command (MAJCOM) commander. His initial error a few years ago was a one-time error and a learning experience. He requests the Board to take into consideration his exceptional accomplishments and recommendations for senior level positions throughout his entire career. He requests the Board to rescind and remove the adverse information from his OSR and recommend his selection folder be reviewed by an upcoming SSB. He has attached Letters of recommendation from the initial imposing authority and his current supervisor that support rescission and removal of the adverse information from his OSR and recommend consideration for SSB.

The applicant's complete response is at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION

DAF/JA recommends denying the applicants LOA removal request. As a preliminary matter, DAF/JA reminds the BCMR that DAF/JA does not conduct a de novo review of the facts. Instead, DAF/JA provides a legal analysis of whether the command action (an LOA) suffered from an error or injustice. For factual determinations, i.e., whether the applicant failed to follow AFI 51-202 when he attempted to set aside a nonjudicial punishment imposed by another commander without seeking adequate legal advice, whether the applicant failed to follow AFI 36-2406 when he attempted to close out a non-referral EPR on the same member, or whether the applicant put the Wing commander at risk – DAF/JA defers to the factfinder. In this case, the factfinder was the Wing commander and he concluded that the applicant did commit the aforementioned deficient acts.

That does not mean a commander is afforded blind deference, however if the Wing commander's action was clearly erroneous or abused discretion, then it can and should be reviewed. To explain what "clearly erroneous" means in a legal sense, the law states that a finding of fact is considered clearly erroneous if "there is no evidence to support the finding." *United States v. Henry*, 81 M.J. 91, 102 (C.A.A.F. 2021). No such evidentiary shortcoming exists in this case. Here, there was ample evidence that the Wing commander could have reasonably relied on. Furthermore, in the applicant's own response letter to the LOA, he acknowledges he committed the acts that formed the basis of the LOA. After careful review, DAF/JA finds no evidence of error or injustice that would undermine the LOA.

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the additional advisory opinion to the applicant on 24 Oct 22 for comment (Exhibit G), the applicant replied on 9 Nov 22. In his response, the applicant concurred with DAF/JA's legal analysis in that, no error or injustice was committed by the command authority. His initial decision was erroneous regarding a personnel action due to incomplete information, and he immediately took corrective measures and formally finalized all

administrative actions pertaining to the incident before the ratee reviewed or signed the document. His corrective measures were advised and reviewed by the local legal office who concurred that his corrective measures were in accordance with Air Force Instructions. Additionally, his immediate corrective actions were not directed by his immediate supervisor or by the initial imposing authority and the actions were completed before discussions with the initial imposing authority began. Since the adverse information was not filed in his PIF by the initial imposing authority, he was under the impression it would have been destroyed in accordance with AFRIMS Table, 36 – 12 Rule 02.00. He successfully completed his intercommand assignment and PCS'd to his current assignment but was never given the file since, it was never filed in his PIF. The initial imposing authority also chose not to establish a UIF or place him on a Control Roster, nor issue him a referral performance report because of the adverse action. He maintained exceptional duty performance throughout the year he received the adverse action. His initial error a few years ago was a one-time mistake and learning experience. This is evidenced by his record and the favorable recommendations for higher level positions and currently he has received back-to-back stratifications from the XXXX. He requests the Board to take into consideration his exceptional accomplishments and recommendations for senior level positions throughout his entire career. He requests the Board to rescind and remove the adverse information from his OSR and recommend his selection folder be reviewed by an SSB. He has attached Letters of recommendation from the initial imposing authority and his current supervisor that support his request.

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 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 AFPC/DP2SSM and DAF/JA, by finding a preponderance of the evidence does not substantiate the applicant's contentions. Furthermore, the applicant has not submitted any new evidence or information that casts doubt on the legal sufficiency of the LOA. Additionally, DAFPM 2021-36-03 directs historic adverse information that was issued prior to the date of the implementation of the policy to be filed in the Master Personnel Records Group (MPerRG). 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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2021-02405 in Executive Session on 6 Apr 22 and 6 Dec 22:

, Panel Chair
, Panel Member
, Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 12 Jul 21.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DP2SSM, dated 3 Mar 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 7 Mar 22.
- Exhibit E: Applicant's Response, w/atchs, dated 6 Apr 22.
- Exhibit F: Additional Advisory Opinion, DAF/JA, dated 21 Oct 22.
- Exhibit G: Notification of Additional Advisory, SAF/MRBC to Applicant, dated 24 Oct 22.
- Exhibit H: Applicant's Response, w/atchs, dated 9 Nov 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9.

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Board Operations Manager, AFBCMR