

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2021-02863

XXXXXXXXXXXXXXXXXX

**COUNSEL:** NONE

**HEARING REQUESTED:** YES

### APPLICANT'S REQUEST

He requests the following based on an allegation of reprisal pursuant to DODD 7050.06, *Military Whistleblower Protection*, and 10 U.S.C. § 1034:

1. His promotion propriety action (PPA) be removed from his record.
2. He be promoted to the rank of colonel (O-6), with date of rank (DOR) and effective date of 1 Feb 19, commensurate with his line number per the CY17D Colonel Line of the Air Force (LAF) Central Selection Board (CSB) Promotion List.

### APPLICANT'S CONTENTIONS

He has exhausted all appeals for removal of his letter of admonishment (LOA), with unfavorable information file (UIF), which was the basis of the PPA. He never received an objective review. He has also exhausted his appeal with the Department of Defense Inspector General (DOD IG).

The PPA and LOA were the result of an investigation that was factually inaccurate and refuted by witnesses. He was able to obtain witness statements that were withheld by the investigating officer (IO). The IO and the legal advisor committed numerous errors during the commander directed investigation (CDI), which was based on a presumption of guilt. His command legal office drafted a narrative with a few key statements that were taken out of context, manipulated and erroneously presented as misconduct. In the fall of 2020, he was successful in contacting key witnesses to provide statements. As a result of the biased and incomplete information, the Secretary of the Air Force (SecAF) was presented with erroneous and incomplete information, which resulted in an unjust PPA action taken against him. The AFBCMR should correct his records in light of the withheld evidence.

He was on temporary duty (TDY) when an Air Force member alleged misconduct he did not commit. His home station commander initiated a CDI. After the CDI, his commander began a misadministration of justice. He was issued an LOA, with UIF which contains false statements about his conduct. The IO drew many false conclusions rather than seek clarification from him and assumed guilt. Although he was somewhat intoxicated in a bar with other Air Force members, he exhibited no conduct that could possibly be construed as conduct unbecoming an officer and a gentleman.

The IO, IG and his commander failed to meet the standards set forth in the 2016 SAF/IGQ CDI guide. His commander directed a subordinate commander to initiate the PPA as an act of reprisal for an Article 138, Uniform Code of Military Justice (UCMJ) complaint received hours earlier. The DOD IG found sufficient evidence to investigate but failed to find reprisal. The resultant ROI lacked any substantive investigation.

The factual errors of the PPA narrative include that he was intoxicated to a level that he lost control and that he behaved in a manner which damaged his standing as a leader. To the contrary, all witnesses described him as calm and quiet and that it was a cordial evening where everyone was home before curfew. The text messages insinuated some sort of ill intent. He sent a text “What room” to a female captain (O-3) as he believed they were going to continue having drinks at lodging upon return to the base. His text message the following day apologizing he had one too many was insinuated as if he had some sort of ill intent. However, the texts were taken out of context. The fact was that they were both married, she was his wife’s colleague and they had mutual friends. At no time did he consider or make any inappropriate advances toward her. Hers was the only phone number he had when attempting to make sure they all had made it back safely to quarters before curfew. At no point did she allege he had flirted with her or exhibited any unprofessional interest. As he was walking back and texting, he chose a concise question. Had he typed it out in its entirety, he would have asked “What room is everyone meeting back at?” She replied back with a question, “Huh?” He then attempted to call her, but the call was disconnected. After not making contact, he sent her a text message that he made it back to quarters safely and to have a good night. There was no inappropriate communication. The IO drew false conclusions. The withholding of his promotion was an arbitrary and capricious injustice. The SecAF approved a PPA believed to have been submitted in good faith and free from motive of reprisal. If his commander or the SecAF had accurate information at the time, they would not have allowed the PPA to happen. Instead, he was denied his promotion, the opportunity to command and the possibility of never flying again in the Air Force.

The applicant’s complete submission is at Exhibit A.

## STATEMENT OF FACTS

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

The applicant provides a redacted CDI report of investigation (ROI). It shows an IO was appointed on 15 May 18 to conduct a CDI into two allegations. The ROI includes several redacted witness statements.

Allegation 1: The applicant committed assault consummated by a battery by biting the shoulder of the complainant at an off-base club on or about 3 May 18. **(SUBSTANTIATED)**. The complainant stated while at the off-base bar, the applicant allegedly came up behind her and without warning put his body up against her back and bit her left shoulder. The applicant had a piece of garment in his mouth. The IO stated while third-party witness testimony did not directly support the allegation, the complainant’s testimony, and circumstantial evidence, supported by witness testimony was judged credible.

Allegation 2. The applicant exhibited conduct unbecoming an officer through his actions at the club on or about 3 May 18 and on or about the morning of 4 May 18. **(SUBSTANTIATED)**.

The ROI includes witness statements contradicting use of vulgar language or inappropriate discussions. The celebration went on at the officer’s club for approximately three hours. At 2300 hours, the applicant and other members went to an off-base bar and met up with a group of judge advocate (JA) officers and an enlisted paralegal. The applicant met the complainant, a female JA captain (O-3), who indicated she knew his wife and that they had another mutual friend.

In response to the allegations, the applicant on 24 May 18 stated he recalled giving her a “bro hug” and patting her on the back. The hug was platonic and consensual and the only form of physical contact. He separated from the group so he could head for the base gate and return before curfew. He was interested in having another beer at lodging as the group discussed and texted the captain since hers was the only number he had to see if they had made it back. She indicated that they had

and he texted "What room?" She replied "Huh." He texted back, said goodnight, and went to bed. The following morning, he recalled the night's conversations and regretted engaging in such political and social discussions, particularly with a junior officer. He did not want any professional friction and sent a text apologizing if he had been rude the night before. She did not respond, and he has had no communication with her since then. He regretted if there were any perceptions that caused anyone offense. She never mentioned any concerns to him. There was nothing that rose to "conduct unbecoming." The ROI includes text messages and the missed calls.

On 27 Jul 18, the applicant received an LOA. The LOA stated an investigation disclosed on 3 to 4 May 18, he was socializing and drinking with other military personnel, both officer and enlisted. By his own admission, he had "one too many" to the point where some witnesses, junior in rank, stated his behavior and level of intoxication made them uncomfortable. He was noticeably intoxicated in public, in a foreign country, in front of subordinates and at least one junior officer assigned to his future command. The applicant was on a TDY assignment to his gaining assignment location. Additionally, after leaving the nightclub, he sent a text message to a female captain asking, "What room?" He then attempted to telephone her three times. When she did not respond, he sent a text the following day apologizing.

The applicant provides an email dated 6 Aug 18 obtained through a Freedom of Information Act (FOIA). The email stated his commander informed the director of personnel that the initial reason for a promotion delay (on-going investigation) had passed and that it was the determination the decision for PPA would be deferred to the assuming commander with administrative control once the member was returned to the Air Force from the joint assignment. An email dated 13 Aug 18, again indicated it would be up to the gaining Air Force commander to determine if a PPA would be recommended to the SecAF. However, a following email dated 14 Aug 18 referenced a meeting held that morning. Based on discussions, they would be amending the original decision, initiate a removal PPA and would work with the Air Force Colonels Group regarding assignment issues. The email also stated there would be two officer performance reports (OPR) generated, an annual with close out date of 23 May 18 and a referral OPR closing out in concert with his permanent change of station (PCS) assignment. The applicant's records do not include any referral OPR.

On 13 Aug 18, the applicant submitted an informal complaint under Article 138 alleging a CDI was initiated based upon unlawful command influence (UCI). His commander stated he would normally not conduct a CDI for the conduct; however, he had too because he received a phone call from [redacted], general officer from the TDY location. He initiated the CDI the same day as the phone call. The applicant stated commanders were required by law to exercise their own independent judgment. The decision to initiate a CDI was based on UCI. He then substantiated the CDI's finding of conduct unbecoming an officer despite insufficient evidence to meet the preponderance of the evidence standard. On 27 Jul 18, he received an LOA that failed to describe any actual misconduct. The applicant requested the allegations be found to be not substantiated and that the LOA and UIF be withdrawn.

Per AF Form 4363, *Record of Promotion Propriety Action*, dated 16 Aug 18 the applicant was notified on 16 Aug 18 his commander was initiating a PPA action for removal of his name from the CY17D Colonel CSB Promotion List for conduct unbecoming an officer. On 11 Mar 19 the Secretary of the Air Force General Counsel (SAF/GCI) found the PPA legally sufficient. On 14 Mar 19, the SecAF approved the removal from the promotion list.

On 15 Jun 19, the applicant submitted a DOD IG complaint of retaliation. The applicant alleged retaliation by his commanders for his filing an Article 138 complaint. He alleged his commander reversed the decision to defer a PPA decision hours after receiving his Article 138 complaint. Further, they made false official statements to IG investigators, claiming they had planned to take the action. He stated documents received via a FOIA request prove the action was taken as

retaliation and they lied to investigators. He was submitting the complaint to the DOD IG rather than SAF/IG because SAF/IG failed to investigate the matter properly. He stated in May 18, a CDI was initiated and on 27 Jul 18 he received a LOA. At the time, he was on the promotion list to colonel. He was advised he would be returned to his service and the gaining Air Force commander would make the decision regarding the PPA in accordance with joint justice policy standards. On 1 Aug 18, he informed his Air Force element commander (AFELM/CC) he intended to contact SAF/IG. On 6 Aug 18, his joint commander was deferring the PPA action to the service commander. On 14 Aug 18, 10 hours after receiving his Article 138 complaint, his commander determined there was new information or change in circumstances regarding the PPA and reversed course and elected to initiate a PPA in retaliation. He provides newly released emails that show his commander decided to defer PPA until his submission of an Article 138 complaint. The DODIG concluded, based on a preponderance of evidence, his commander did not initiate a PPA against the applicant in reprisal for his protected communication. Further, his commander did not influence or make a recommendation as the reviewing commander to recommend removal from the promotion list in reprisal for making protected communication.

On 1 Jul 19, the applicant retired in the rank of lieutenant colonel. He was credited with 20 years, 1 month and 10 days of active duty service.

The applicant provides a redacted Whistleblower Reprisal Investigation dated 3 Mar 20. It states on 14 May 18, the applicant's gaining Numbered Air Force Vice Commander (NAF/CV) sent an email to the applicant's commander stating the applicant's upcoming assignment was canceled due to an incident that occurred while the applicant was TDY at the location. On 27 Jul 18, his commander reviewed and concurred with the ROI but dropped the allegation of assault consummated by battery and issued the applicant a LOA, with UIF. On 13 Aug 18, the applicant filed an Article 138 complaint and the DODIG determined the complaint was protected communication under 10 U.S.C. § 1034 and DOD 7050.06, *Military Whistleblower Protection*. The DODIG noted the close timing between the Article 138 complaint on 13 Aug 18 and the PPA three days later, on 16 Aug 18. Nevertheless, the DODIG determined by a preponderance of the evidence his commanders would have taken the personnel action absent the Article 138 complaint.

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

#### **APPLICABLE AUTHORITY/GUIDANCE**

Per 10 U.S.C. § 1034 and AFI 90-301, *Inspector General Complaints Resolution*, reprisal against military members for making protected disclosures is prohibited.

#### **AIR FORCE EVALUATION**

AFPC/DP2SSM recommends denial for removal of the LOA. The applicant received a LOA and UIF based on the preponderance of evidence in accordance with AFI 36-2907, *Adverse Administrative Actions*. However, the LOA and UIF are not maintained in the applicant's personnel record. Either it was never filed or already removed, so there is no action for the Board to take on the request for removal.

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 25 Apr 22 for comment (Exhibit D) but has received no response.

## **ADDITIONAL AIR FORCE EVALUATION**

AFPC/DP2SP recommends denial for removal of the PPA and change of his rank to colonel. The applicant met and was selected for promotion to colonel by the CY17D Colonel LAF CSB, which convened on 16 Oct 17. His projected pin-on date was 1 Feb 19. AFI 36-2501, *Officer Promotions and Selective Continuation*, states commanders should question promotion when the preponderance of evidence shows the officer has not met the requirement for exemplary conduct set forth in 10 U.S.C. § 9233 or is not mentally, physically, morally, or professionally qualified to perform the duties of the higher grade.

Promotion is not a reward for past service. It is an advancement to a position of greater responsibility based on Air Force requirements and the officer's potential. If an officer has not met the requirement for exemplary conduct set forth in 10 U.S.C. § 8583 or is not mentally, physically, morally or professionally qualified to perform the duties in the next higher grade, it is in the best interest of the Air Force for the proper authority to initiate action to delay promotion, to find an officer not qualified for promotion, or to remove the officer from a promotion list. The applicant received a LOA and UIF for the actions which resulted in the removal from the promotion list. The authority to remove a PPA and promote the applicant is the SecAF. On 27 Mar 19, the SecAF approved the removal from the promotion list.

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

The Board sent a copy of the advisory opinion to the applicant on 12 Oct 22 for comment (Exhibit F). In a response dated 12 Oct 22, the applicant states the AFPC/DP2SSM advisory is unrelated to the basis of his appeal, which is evidentiary, not procedural in nature. Therefore, the Board should not give any additional weight to the recommendation to deny the request.

The AFPC/DP2SP advisory similarly provides no insight or analysis as to the newly received exculpatory evidence provided to the Board. The advisory merely provides a chronology of events. The allegation of conduct unbecoming is the only matter at issue in the LOA and PPA. In light of the statement provided, there is no evidence of any behavior cited in the LOA and PPA.

He asks the Board to consider the standard of proof required for administrative actions. Based on the new eyewitness statements refuting the fabrication of the LOA, a reasonable finder of fact cannot hold the preponderance of evidence standard to conclude conduct unbecoming. Had his commander been privy to the testimony, he no doubt would have been promoted to the rank of colonel.

The applicant's complete response is at Exhibit G.

## **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 recommendations of AFPC/DP2SSM and AFPC/DP2SP and finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant contends the LOA was the result of an inaccurate investigation and the PPA was in reprisal for his Article 138 complaint; however, he has not sustained his burden of proof to corroborate his assertions. The Board conducted its own independent review of the CDI ROI and finds no evidence the investigation was improperly conducted or that evidence was

withheld or fabricated. In this respect, the Board finds the CDI ROI includes sufficient evidence to conclude the applicant exhibited conduct unbecoming an officer while on a TDY assignment to his gaining unit of assignment and the IO had sufficient evidence to substantiate the allegations. While the applicant contends his text messages and actions were taken out of context and there was no misconduct, the Board finds the applicant's conduct deviated from the expected standards of professionalism and conduct the Air Force expects from senior Air Force officers. Accordingly, the Board finds no evidence of an error or injustice in the LOA or PPA. Further, in accordance with AFI 36-2907, the issuance of the LOA was well within the applicant's commander's discretion and authority. The Board recognizes the PPA for removal of his name from the CY17D Colonel LAF CSB list was initiated on 16 Aug 18, three days after he filed his Article 138 complaint on 13 Aug 18; however, the Board finds this insufficient to conclude the applicant was the victim of reprisal, in violation of 10 U.S.C. § 1034. In this respect, the Board agrees with the DOD IG that the applicant's commander would have initiated a PPA absent the Article 138 complaint based on the substantiated allegations and finding the applicant exhibited conduct unbecoming an officer while on a TDY assignment. Further, there is no evidence to show the SAF or DOD IGs failed to conduct fair and impartial analysis into his complaint of reprisal. Moreover, the PPA recommendation was reviewed by SAF/GCI and found legally sufficient prior to the SecAF's final decision on 14 Mar 19. 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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2021-02863 in Executive Session on 8 Nov 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 16 Aug 21.  
Exhibit B: Documentary evidence, including relevant excerpts from official records.  
Exhibit C: Advisory Opinion, AFPC/DP2SSM, dated 21 Apr 22.  
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 25 Apr 22.  
Exhibit E: Advisory Opinion, AFPC/ DP2SP, dated 18 Jul 22.  
Exhibit F: Notification of Advisory, SAF/MRBC, dated 12 Oct 22.  
Exhibit G: Applicant's Response, dated 12 Oct 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.