

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-03297

XXXXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. His letter of admonishment (LOA), dated 25 Oct 20 be removed from his record.
2. The Secretary of the Air Force Inspector General (SAF/IG) Addendum to the Report of Investigation (ROI), dated 20 May 20 be removed from his record.

APPLICANT'S CONTENTIONS

Counsel, on behalf of the applicant, states he was the subject of an IG ROI initiated in 2019. At the time, he was a security forces squadron commander (SFS/CC) in the Air National Guard (ANG). The IG complainant (a staff sergeant in the unit) filed a reprisal complaint against the applicant for making protected communication. The complainant filed an IG complaint alleging members of the wing improperly consumed alcohol during a training event which was ignored by the applicant and other members of the chain of command. The complainant alleged he received two letters of counseling (LOC), a letter of reprimand (LOR), a security information file (SIF) and decertification of his Air Force Specialty Code (AFSC) in reprisal for making protected communication.

The investigating officer (IO) found all eight allegations of reprisal were not substantiated. The IO substantiated the allegation he failed to follow AFSC decertification instructions. The IO noted the complainant had a long documented history of dishonesty and conduct unbecoming of an Air Force military police officer.

On 20 May 20, the SAF/IG released an addendum to the original ROI, overturning the IO's findings regarding the allegations of reprisal. The addendum stated that the complainant's performance issues justified the adverse actions; however, the IO did not fully analyze the motive and timing aspects of the causation analysis. The addendum justified the reversal of the findings by stating the applicant had motive to reprise against the complainant. The applicant was directed to conduct an inquiry into the alcohol consumption incident and he knew who filed the IG complaint on 23 Aug 17 because the complainant's name was poorly redacted on the complaint form. As for timing, the addendum states he completed his commander's inquiry into the IG complaint on 17 Sep 17 and did not substantiate the alcohol consumption allegations. That same day, he issued the complainant an AFSC decertification memorandum, recommended a SIF and supposedly ordered the complainant to be issued two LOCs and an LOR.

As a result of the SAF/IG ROI addendum, the applicant was issued a LOA on 25 Oct 20. On 5 Dec 20, he responded to the LOA and denied personal malice for the personnel actions against the complainant and explained the quickened issuance of the personnel actions was based on the evidence available and to provide the complainant time to respond. The personnel actions were not due to reprisal but the adverse actions were already in progress well before the complainant contemplated an IG complaint.

There were procedural errors during the SAF/IG review of the initial investigation. The SAF/IG re-interviewed several key witnesses; however, the applicant was never given the opportunity to provide the IO with additional information. Therefore, the applicant was deprived of the opportunity to address his concerns. While the Air Force instruction does not expressly state the applicant must have been offered a formal recorded interview, the clear intent is to offer airmen a meaningful opportunity to respond to a SAF/IG investigation. The commander's directed inquiry guide and regulation contain implicit intent to offer due process protections to service members before an IO completes their findings and recommendations and submits them for action. The applicant was denied due process protection. The SAF/IG relied heavily upon a senior enlisted member's testimony that the decertification action seemed extreme. The SAF/IG also relied on senior enlisted members' testimony that the applicant directed the writing of the justifiable issues.

The SAF/IG ROI Addendum is also materially inaccurate. It states on several occasions the applicant directed senior enlisted leadership to issue the LOCs and LOR. However, he fervently denies he ever directed anyone to issue the LOCs and LOR. Rather, he instructed the senior noncommissioned officers (SNCOs) to issue the personnel actions if they believed they were justified. Additionally, only one witness out of everyone re-interviewed changed their testimony. Under the relatively low evidentiary standard of preponderance of the evidence, one sentence of new testimony does not meet the requisite evidentiary standard when the overwhelming majority of the testimony remained the same.

His response to his LOA provides a timeline of the complainant's misconduct. The complainant was a troubled airman with a long history of intentional deceit, subpar performance and attitude and the inability to take accountability for his own actions.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a lieutenant colonel (O-5) in the Air Force Reserve.

The applicant was a SFS/CC in the ANG when the complainant filed an IG complaint alleging the applicant and other senior leaders in the squadron reprised against him for making protected communication, in violation of 10 U.S.C. § 1034.

The Wing IG (WG/IG) ROI, dated 2 Nov 19, shows the complainant alleged a toxic leadership in the SFS. The unit practiced unfair promotion practices, unfair disciplinary actions and targeted members who raised concerns about issues. An investigation was conducted and the original IO interviewed 11 witnesses, 6 subjects and 2 subject matter experts. The WG/IG returned the ROI for clarification and completion of audio transcripts. A new IO was appointed and on 18 Mar 19 one witness was re-interviewed. SAF/IGQ determined the case contained administrative errors and the ROI was updated based on written feedback from SAF/IGQ. The WG/IG ROI shows the following accusations and findings:

Allegation 1. On or about 17 Sep 17, the applicant issued an AFSC Decertification Memorandum to the complainant in reprisal for making a protected communication. **(NOT SUBSTANTIATED)**.

Allegation 2. On or about 17 Sep 17, the applicant failed to follow the AFSC decertification instructions and/or guidance. **(SUBSTANTIATED)**.

Allegation 3. On or about 17 Sep 17, the applicant ordered two LOCs be issued to the complainant by the two named master sergeants (E-7) in reprisal. **(NOT SUBSTANTIATED)**.

Allegation 4. On or about 17 Sep 17, the applicant ordered a LOR be issued to the complainant by the named senior master sergeant (E-8). **(NOT SUBSTANTIATED)**.

Allegation 5. On or about 17 Sep 17, the named chief master sergeant (E-9) influenced an AFSC Decertification of the complainant in reprisal **(NOT SUBSTANTIATED)**.

Allegation 6. On or about 17 Sep 17, the named chief master sergeant recommended a security information file (SIF) to the complainant in reprisal. **(NOT SUBSTANTIATED)**.

Allegation 7. On or about 17 Sep 17, the named master sergeant issued a LOC to the complainant in reprisal **(NOT SUBSTANTIATED)**.

Allegation 8. On or about 17 Sep 17, the named senior master sergeant issued a LOR in reprisal. **(NOT SUBSTANTIATED)**.

Allegation 9. On or about 17 Sep 17, the named master sergeant issued a LOC to the complainant in reprisal. **(NOT SUBSTANTIATED)**.

All 8 of the reprisal allegations were found to be not substantiated. Allegation 2 (substantiated) was not a reprisal allegation. Although the actions were hastily prepared and poorly executed, there was no evidence the subjects were taking the actions based upon the protected communication with the IG. The personnel actions taken were appropriate due to the complainant's long documented history of dishonesty, conduct unbecoming of an Air Force military police officer and for failure to follow policies and directives. There were several issues that created the sense of urgency for the issuance of the actions on the same day, which was the second day of the RSD on 17 Sep 17. First, an e-mail was received on 17 Aug 17 from the applicant's landlord regarding his failure to make payment per a court order as agreed to in a civil action law suit. There were also time constraints due to the applicant being a traditional drill status guardsman (DSG) and the complainant was being referred to the deployment availability working group (DAWG), which could make him unable to participate in future RSDs. Further, AFI 90-301, *Inspector General Complaints Resolution*, allows commanders to continue actions and IGs cannot delay command and personnel actions. The filing of an IG complaint will not delay or prevent completion of command actions. The second interviews with the named individuals supported the LORs and LOCs as standard progressive discipline tools in the security forces squadron. It did appear the squadron needed to be trained on the appropriate use of progressive disciplinary tools.

The SAF/IGQ Addendum to the ROI dated 20 May 20, states the SAF/IGQ is the reviewing authority for all Air Force IG ROIs before such cases are forwarded to the Department of Defense (DOD) IG for final approval. As such, a review of the case was conducted and the addendum addresses the noted deficiencies in the ROI:

Allegation 1, 3, and 4 pertaining to the applicant were overturned and **SUBSTANTIATED**. SAF/IGQ found the complainant's past performance issues justified the resulting personnel actions. The IO; however, did not fully analyze the motive and timing aspects of the causation analysis. On 23 Aug 17, the applicant was directed to conduct a commander's inquiry into the drinking incident that drove the IG complaint. The applicant was given the complainant's AF Form 102, *Inspector General Complaint Form*, with the complainant's name showing through the poorly redacted complaint form. On 16 Sep 17, the complainant was brought into the office where his supervisors allegedly accused him of being a liar. On 17 Sep 17, the applicant completed the commander's inquiry into the alleged drinking incident and did not substantiate any allegations. The same day, the applicant issued the complainant an AFSC decertification, recommended a SIF and ordered the issuance of the LOCs

and LOR. The named SNCOs had previously discussed amongst themselves if and when to issue the complainant the personnel actions when the applicant directed them to issue the respective paperwork on the same day. The coordination and the urgency in issuing the personnel actions immediately following the commander's inquiry into alleged drinking events is arguably undue command influence and suggests the applicant acted in reprisal for the drinking IG complaint. A more reasonable command approach, not influenced by an ulterior motive, would have been to allow each supervisor to decide if and when to issue their respective paperwork to the complainant. The named senior master sergeant testified the applicant ordered the LOCs and LOR and he thought the decertification was extreme. With respect to the timing, the applicant and the chief master sergeant were notified of the complainant lying about the landlord issue and his debt. The applicant did not collect the documentation requested to further discuss the AFSC decertification. Instead he proceeded in executing all five personnel actions on the same day.

On 25 Oct 20, the applicant was issued a LOA. It stated an investigation conducted by SAF/IGQ disclosed he reprised against a subordinate for making a protected communication while he was in command of the squadron in 2017. Pursuant to the addendum to the ROI prepared by SAF/IGQ, he authorized the issuance of two LOCs, a LOR and AFSC decertification memorandum. His conduct demonstrated poor judgment and compromised his credibility as a commander.

On 25 Oct 20, the applicant was relieved of command for cause in accordance with AFI 51-509, *Appointment to and Assumption of Command*, effective 1 Dec 20.

The applicant's response to the LOA dated 5 Dec 20, includes a timeline showing the investigation of the complainant started long before his knowledge of the complaint. Coincidentally, the complaint occurred over the same time period. The decision for the personnel actions were not hastily made but included consultation with the staff judge advocate (SJA), IG, mission support group commander (MSG/CC), the wing psychologist, wing medical and the squadron senior leadership. The timeline shows the complainant's numerous infractions from 2012 to 2017, to include employment termination, missed unit training assemblies (UTA), failure to pay rent as ordered by the court, failed fitness assessments, allegations of violating off-base travel rules while deployed, insubordination and breach of security protocols while deployed. The incident that led to the IG complaint occurred during an annual training (AT). During off duty hours, members engaged in consuming alcoholic beverages at lodging and surrounding picnic areas. The event was common practice at ATs. He arrived in the evening to find the chief master sergeant visibly intoxicated and acting unprofessionally. He ended the evening and directed everyone back to their rooms. The chief master sergeant was reprimanded for his actions the following UTA in Jun 17. Counsel provides copies of memorandums for record (MFR), termination of employment, LOCs, LORs, FA failures, missed UTAs and other documents pertaining to the complainant in his AFBCMR application.

On 30 Apr 21, the applicant was discharged from the ANG and transferred to the Air Force Reserve effective 1 May 21.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisory at Exhibit D.

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.

AFI 90-301, *Inspector General Complaints Resolution*, paragraph, 1.12.4, SAF/IG has oversight authority over all IG investigations to include commenting on and overturning any subordinate IG's findings.

AIR FORCE EVALUATION

DAF/JA recommends denial. There is certainly room to argue that the potential consequences of the SAF/IGQ Addendum could be unfair to the applicant, given incontrovertible findings of the complainant's long history and pattern of documented dishonesty and misconduct warranted all of the negative personnel actions. However, the question is whether the SAF/IGQ conclusion that the applicant committed reprisal was unjust. The standard of proof is preponderance of the evidence, 51 percent, which is a low threshold for SAF/IGQ. Hence the reinvestigation was conducted within the rules, the analysis was based on reasonable interpretations of the law and there was sufficient evidence to support SAF/IGQ's conclusion. Despite a reasonable argument of potential unfairness, DAF/JA finds no injustice.

The SAF/IGQ interpreted the motive and timing behind the negative personnel actions differently than the IO and found the applicant executed the personnel actions against the complainant in reprisal. The applicant contends there were material errors in the reinvestigation as he was never given the opportunity to provide SAF/IGQ with additional information through a formal recorded interview and was not informed of any specific additional information SAF/IGQ was seeking during the reinvestigation. It is true that if SAF/IGQ were looking into new allegations, the applicant should have been given notice and an opportunity to provide his statement pursuant to AFI 90-301. However, this was not an investigation of any new allegations, but rather a re-investigation of the same allegations, albeit with a different focus. Hence, there are no errors in the process.

The applicant also argues the SAF/IGQ Addendum was materially inaccurate as to whether the applicant directed the LOCs and LOR be issued. In essence, he denies he directed such personnel actions. In this respect, it is noted the IO who determined there was no reprisal indicated the applicant abused his commander's authority when he directed the issuance of the disciplinary actions. Further, the three senior enlisted supervisors expressed concern about administering the disciplinary actions. The appropriate action should have been to only inform the senior enlisted supervisors that the IG complaint did not inhibit appropriate disciplinary action; but instead the applicant directed the specific disciplinary actions. Hence, there is no error in the factual findings.

With respect to the applicant's allegations of material injustice due to the SAF/IGQ addendum's negative consequence on his military career advance. DAF/JA does not opine on alleged future harm as that is speculative. The CDI IO substantiated the allegation that the applicant failed to follow AFSC decertification guidelines and the CDI IO's conclusion the applicant was not as engaged as he could be and relied mostly on the input from the chief master sergeant. This is relevant because a portion of the complainant's initial IG complaint against his command was a direct accusation of misconduct against the chief master sergeant and included a video taken by the complainant of him urinating in public while inebriated. The Board can consider these background facts to weigh whether there was indeed sub-optimal leadership before SAF/IGQ's findings. Hence, there is no injustice in the findings.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 20 Jan 22 for comment (Exhibit E), and the counsel replied on 15 Feb 22. He disagrees with the findings and

recommendation of the advisory opinion. Although the investigation was not a new investigation but rather a reinvestigation, the reinvestigation still interviewed at least three airmen regarding the allegations against the applicant. The reinvestigation found new evidence which was used against the applicant without the opportunity to rebut or challenge the new averments. As such, SAF/IGQ had a limited scope before making a subjective decision. This is counter to the intent of the investigation because SAF/IGQ failed to gather all relevant information. The oversight is *prima facie* example of a material error of procedures that undoubtedly prejudiced the applicant during the investigation.

He also denies he directed the adverse actions against the complainant. After conferring with the SJA, he explained to the complainant's leadership that the adverse actions should be issued if warranted. This is significantly different than what the advisory opinion states. The advisory opinion omits that the complainant was not decertified in his AFSC. Thus, any claim he failed to follow decertification guidelines is moot and inconsequential. The advisory opinion also seems to take issue the applicant relied on the chief master sergeant and other senior enlisted personnel for their input. The author must not understand the applicant was a traditional Reservist and only able to interact with the airmen under his command on a limited basis. Obviously, the applicant or any other officer in his position would rely on the recommendations of the full-time personnel, such as the chief master sergeant, to observe the daily interactions and report back to the applicant on drill weekends. To not rely on the chief master sergeant and other full-time Reserve personnel would have been a malfeasance by the applicant. In light of these facts, he requests the LOA and the SAF/IG Addendum to the ROI be removed from his records.

The applicant's complete response is at Exhibit F.

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 the victim of an error or injustice. The Board notes DAF/JA recommends against correcting the record stating the SAF/IGQ reinvestigation was conducted within the rules and the conclusion the applicant committed reprisal was based on reasonable interpretations of the law. However, the Board also notes DAF/JA states that the potential consequences of the SAF/IGQ Addendum ROI could be argued as unfair to the applicant given the long history and pattern of documented dishonesty and misconduct by the complainant. DAF/JA further states the standard of proof for SAF/IGQ to substantiate reprisal was a low threshold. In view of the above and the totality of the evidence, the Board recommends, in the interest of justice, that the applicant's LOA dated 25 Oct 20 and the SAF/IG Addendum to the ROI dated 20 May 20 be removed from his records. In this respect, the Board notes SAF/IGQ questioned the applicant's motives and timing in issuing the negative personnel actions against the complainant in substantiating the applicant reprised against the complainant. However, the Board finds it is reasonable to conclude the timing of the unfavorable personnel actions were due to the applicant's status as a DSG and the scheduled UTA, rather than reprisal for the complainant making protected communication. The Board also recognizes the SAF/IG Addendum ROI shows some of the enlisted supervisors changed their statements and expressed concern during the reinvestigation about being directed to administer the unfavorable personnel actions. However, the Board finds there is insufficient evidence to substantiate the applicant ordered the senior enlisted supervisors to issue the LORs and LOCs. Moreover, the Board finds it was within the applicant's authority as the squadron commander to discuss the unfavorable personnel actions with the supervisors given the complainant's misconduct, dishonesty and violation of standards. Based on the evidence, it appears the complainant was not decertified from his AFSC and the Board does not find the LORs and LOCs

issued to the complainant for his misconduct were unjust, disproportionate, unduly harsh or in reprisal for making protected communication. Therefore, the Board recommends correcting the applicant's records as indicated below.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show:

- a. The letter of admonishment (LOA), dated 25 Oct 20 be void and removed from his records.
- b. The Secretary of the Air Force, Office of the Inspector General (IG) Complaints Resolutions Directorate, Addendum to the Report of Investigation (ACTS FRNO 2017-17601), dated 20 May 20 be removed from his record and the IG Automated Case Tracking System (ACTS).

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-2021-03297 in Executive Session on 15 Mar 22:

, Panel Chair
, Panel Member
, Panel Member

All members voted to correct the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 6 Aug 21.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: SAF/IG ROI, w/atchs, dated 2 Nov 19. (WITHDRAWN).
Exhibit D: Advisory, DAF/JA, dated 18 Jan 22.
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 22 Jan 22.
Exhibit E: Applicant's Response, dated 12 Feb 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.