

## ADDENDUM TO RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

XXXXXXXXXXXXXXXXXX

**DOCKET NUMBER:** BC-2021-03470-2

**COUNSEL:** XXXXXXXXXXXXXXXXXXXX

**HEARING REQUESTED:** YES

### APPLICANT'S REQUEST

The Board reconsider his request for the following:

1. His nonjudicial punishment (NJP) be set aside and removed from his master personnel records group (MPerGP) and his officer selection record (OSR).
2. He be reimbursed the forfeiture of pay per the NJP.
3. His referral officer performance report (OPR) for the period ending 19 Feb 20 be removed from his MPerGP and OSR.
4. Any other corrections the Board deems are required to make him whole.

### RESUME OF THE CASE

The applicant is a major (O-4) in the Air Force.

AF Form 3070C, *Record of Nonjudicial Punishment Proceedings (Officer)*, dated 31 Jul 19 shows the applicant received an Article 15 for the following:

a. On 28 Nov 18, he knowingly and wrongfully distributed a recording of the private area of [redacted], when he knew or reasonably should have known that the said recording was made without the consent of [redacted] and under circumstances in which she had a reasonable expectation of privacy.

b. Between 1 Jul 18 and 31 Jul 18, he showed [redacted] an intimate visual image of [redacted], such conduct unbecoming an officer and a gentleman.

c. On 28 Nov 18, he communicated to [redacted] and [redacted] certain indecent language in reference to [redacted], such conduct unbecoming an officer and a gentleman.

Punishment included forfeiture of pay in the amount of \$3,618 pay per month for two months. The forfeitures in excess of \$3,618 pay per month for one month was suspended through 21 Feb 20, and a reprimand.

The applicant received a referral OPR for the period ending 19 Feb 20. The OPR stated he received an Article 15 for wrongfully distributing an indecent visual image in violation of Article 120c.

In a memorandum for record (MFR) dated 7 May 21, the numbered air force commander (NAF/CC) stated the major command commander (MAJCOM/CC) directed all aspects of the NJP

be reviewed. He found the chain of command's actions and the outcome reasonable and appropriate given the evidence and legal opinions; however, he determined a portion of the evidence derived from the investigation used to substantiate the NJP was illegally obtained. As such, he was executing a partial set aside of the Article 15 punishment for the two specifications that were based solely on the illegally obtained evidence. The Air Force Office of Special Investigations (AFOSI) obtained a search authorization from his commander the day prior to their interview and compelled the applicant to provide his passcode in violation of his constitutional right against self-incrimination. This was done after the applicant invoked his right to counsel under Article 31, UCMJ and *Miranda*. Without the phone, the AFOSI would not have discovered the additional conversation and exchange of the photo. This derivative evidence served as the sole evidence substantiating specifications one and three. The AFOSI violated the applicant's right to counsel by asking for his passcode/pin after he invoked his right to counsel. Further, the adjudged and executed punishment was no longer reasonable or appropriate upon removing specifications one and three of the Article 15 and modified accordingly.

AF Form 3212, *Record of Supplementary Action Under Article 15, UCMJ*, dated 7 May 21 shows the NAF/CC, the successor in command to the officer who imposed the punishment, set aside the portion of the NJP which called for forfeitures in excess of \$1,000 pay per month for two months and changed the language of the reprimand.

In a DD Form 149, *Application for Correction of Military Records*, dated 26 Oct 21, the applicant requested the Board set aside his NJP, remove the NJP from his OPR, remove his referral OPR and restore any rights the Board deemed necessary and just. On 17 May 22, the Board considered and partially granted his request and recommended his AF Form 3070C, Block 15, specifications one and three be redacted. Although DAF/JA recommended denial, the Board noted the NAF/CC's MFR dated 7 May 21 outlining the justification for the set aside of the two findings due to the determination the evidence was obtained illegally. However, the Board found insufficient evidence to remove the NJP or referral OPR from his record. The Board found no evidence the commander abused his discretion in administering the NJP, finding the applicant committed the offense and the punishment imposed was within the permissible range for the applicant's offense. An AFBCMR Directive was issued on 20 Feb 23 directing the correction of the applicant's AF Form 3070C and a copy of the Record of Proceedings, Directive and AFBCMR Notification letter were emailed to the applicant and counsel on 23 Mar 23. The applicant's automated records management system (ARMS) does not reflect the corrections have been made as of this date.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letter and Record of Proceedings at Exhibit F.

On 6 Apr 23, the applicant requested reconsideration of his request. In support of his reconsideration request, the applicant submitted new evidence to include a sworn statement, character statements, AF/JAX memorandum dated 11 Jun 21 and counsel's brief. Neither the Board nor the DAF/JA advisory opinion addressed the sworn statement [redacted] executed where he recants the text message and the AFOSI testimony used to substantiate the third and last charge against him in the NJP. This evidence was not previously considered by any general officer in the review of his case. The Board in his initial case directed two of the three charges be redacted but did not direct the removal of the NJP or referral OPR, despite the OPR stating Article 120c, which the Board redacted in the NJP. He has suffered for four years due to the error and injustice in his record. He was denied a Meritorious Service Medal (MSM) for his assignment, was nonselected for promotion to lieutenant colonel and his subsequent OPRs have been impacted.

He has lived with the injustice while his female counterpart went unpunished despite clear violations. He waited for years and numerous Freedom of Information Act (FOIA) requests to prove what he and the judge advocates (JA) already knew to be true, that AFOSI violated his rights and multiple inspector generals (IG) lied and covered up the actions. Following his complaint to

elected officials, the MAJCOM/CC directed the NAF/CC to conduct a review of his case. The NAF/CC conducted a review but the sworn statement from [redacted] was not included in the review. His female counterpart also took pictures of him without consent and shared the photo but neither the AFOSI nor any JA ever took any action after she stated she did not remember.

He provides a sworn statement from [redacted] dated 20 May 21, in which [redacted] states he did not provide any sworn statement to AFOSI. On 31 May 19, he was unaware of the purpose of his interview with AFOSI. He did his best to provide information despite his lack of clarity. He is now aware of the accusations against the applicant and is not confident his interview with AFOSI and text message conversations represented the truth. The only truthful statement concerning his memory of the alleged incident is that he does not recall now or then with any certainty the applicant showed him or that he may have seen the photo in question and whether or not it contained any nudity.

The applicant provides a memorandum from [redacted] dated 25 Aug 19 noting the statements he made to AFOSI were misconstrued in a way to actually become a lie. The egregious falsification by means of paraphrasing within the report presented a false testimony and alluded to things he neither said nor alluded to. On 31 May 19, he was interviewed by two AFOSI agents. He was truthful as possible. Only one of the agents took notes and the notes were not his words in verbatim. At the end of the interview, he signed an affidavit but did not provide a written statement. He was never shown the agent's notes. On 25 Aug 19, he became aware of the summary report the AFOSI made of his interview. Although most of the summation was accurate, one crucial statement was a lie. The statement he said the applicant showed him nude photographs of his romantic interest was a lie.

The applicant provides a memorandum from AF/JAX that states final action was taken on the applicant's professional responsibility complaint concerning actions taken by the MAJCOM, NAF and WG judge advocates. The Judge Advocate General (TJAG) considered his complaint, the recommendation of a senior reviewing attorney and the recommendation of the TJAG's Advisory Committee on Professional Responsibility and Standards. The action was complete and the case closed. Specific actions taken were protected by the Privacy Act and were not releasable.

Counsel's brief includes an additional matter for consideration. He did not include the matter in his initial application because he did not want to detract from the justice; however, the Board should be aware the alleged victim in the case committed her own wrongdoing against the applicant. Specifically, [redacted] reported being at a bar with the applicant and the alleged victim revealed a nude picture of the applicant asleep on the couch. A witness account dated 12 Aug 19 is provided. The AFOSI agents recovered the referenced photo and the applicant was assigned to a special victim's counsel (SVC). He made an initial statement but declined to be interviewed because he did not want her to suffer a detriment to her career. Ultimately, she received no repercussion for her misconduct and the Board should be aware of the disparity in treatment between the two, for almost the identical alleged misconduct.

The applicant's complete submission is at Exhibit G.

In an additional response dated 30 May 23, he states he was not selected for promotion to lieutenant colonel in Feb 23 due to the injustice of the derogatory information in his records. His initial submission to the AFBCMR was in Oct 21. He received the final AFBCMR response in Mar 23, 516 days and over 17 months later. The AFBCMR also did not address the main issue in his submission. Had his case been resolved and his record cleared of the NJP and referral OPR, he would have been promoted. He provides communication with the AFBCMR where he communicated over the 16 month period to check on his case. To his understanding, the Board aims to provide case closure within 90 days for active duty members. He also provides his most recent OPR. His stratification and promote recommendation would have been much higher had

the derogatory information not been present. Fear is a powerful tool that when used improperly can cause individuals and an organization to act uncharacteristically and out of accord with its own values. This debacle is the result of that fear. He has been slandered enough, suffered more than most could stomach and witnessed too many leadership failures for this to continue.

He provides a memorandum from his commander dated 30 May 23 stating he was not selected for promotion to lieutenant colonel by the P0523A board. The nonselection was due in large part to existing derogatory information in his record. If the AFBCMR determines the applicant's records should be fully cleared, he should not suffer further injustice for matters outside of his control. He encourages the Board to direct his promotion to lieutenant colonel as soon as possible, pending the full and complete removal of all derogatory information in his records from his Oct 21 request.

He provides his letter to the P0523B LAF-A Lieutenant Colonel CSB dated 11 Feb 23. He indicated his case has been under the AFBCMR review since Oct 21. Almost a year and a half later, he has not received the final response.

The applicant also provides his OPR for the period ending 12 Oct 22 and PRF for the P0523B board showing he received a "Promote" recommendation. In a memorandum dated 18 May 23, his commander informed him he was not selected for promotion to lieutenant colonel by the P0523B CSB.

The applicant's complete submission, with attachments, is at Exhibit I.

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

Per 10 U.S.C. § 615(a)(3), DoDI 1320.14, *DoD Commissioned Officer Promotion Program Procedures*, and DAFI 36-2501, *Officer Promotions and Selective Continuation*, paragraph A14.2.1. All adverse information an officer receives will be filed in the OSR and be considered by promotion selection, special selection, and selective continuation boards to the grade of O-4 and above (to include processes for O-3 promotions that have "extraordinary adverse information"). Adverse information is any substantiated finding or conclusion from an officially documented investigation or inquiry or any other credible information of an adverse nature. To be adverse, the information must be derogatory, unfavorable or of a nature that reflects unacceptable conduct, integrity or judgement on the part of the individual. Adverse information includes but is not limited to any substantiated finding or conclusion from an investigation or inquiry, regardless of whether command action was taken, court-martial findings of guilt, nonjudicial punishment (NJP) pursuant to Article 15, LOR, letter of admonishment, relief of command for cause, removal from developmental education for cause, and letter of counseling. All adverse information as defined will be permanently placed in the record. Except for set aside of a court-martial or NJP action, removal of adverse information from the records may only be directed by an AFBCMR recommendation.

DAFI 36-2603, *Air Force Board for Corrections of Military Records (AFBCMR)*, paragraph 2.4. The Board normally decides cases on the written evidence contained in the record. It is not an investigative body; therefore, the applicant bears the burden of providing evidence of an error or injustice.

#### **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 remains unconvinced the evidence presented demonstrates an error or injustice. The Board notes the applicant's MAJCOM/CC directed the NAF/CC to conduct a review of his case and based on the evidence of illegally obtained evidence and inconsistencies, the NAF/CC modified the applicant's NJP as appropriate. Further, the Board partially granted the applicant's initial request and directed the AF Form 3070C be corrected to reflect the redaction of specifications one and three. However, the Board found no evidence the commander abused his discretion in administering the NJP, finding the applicant committed the offense. The applicant provided updated statements of support modifying or redacting prior AFOSI statements; however, the Board did not find the evidence persuasive to conclude the applicant did not engage in the misconduct for which he received NJP and referral OPR. The applicant also alleges his female counterpart engaged in the same misconduct but received no adverse actions. In this respect, per DAFI 36-2603, the Board is not an investigative body and finds the applicant's assertions fail to sustain his burden of proof he received disparate treatment or that the NJP and referral OPR he received were unjust or in error. In his rebuttal response dated 30 May 23, the applicant provides a copy of his letter to the P0523B CSB dated 11 Feb 23 in which he states his case has been under the purview of the Board since Oct 21 without resolution. In this respect, the Board notes it appears a copy of the Directive dated 20 Feb 23 and Record of Proceedings dated 23 Jan 23 were emailed to the applicant and his counsel on 23 Mar 23. While the records corrections in his initial case remain pending, the Board finds the applicant's initial case was properly adjudicated and there remains no actions pending for the Board in that case. 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-2021-03470-2 in Executive Session on 18 May 23 and 27 Jun 23:

, Panel Chair  
, Panel Member  
, Panel Member

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

Exhibit F: Record of Proceedings, w/ Exhibits A-J, dated 23 Jan 23.  
Exhibit G: Application, DD Form 149, w/atchs, dated 23 Jan 23.  
Exhibit H: Documentary evidence, including relevant excerpts from official records.  
Exhibit I: Applicant's response, w/atchs, dated 30 May 23.

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.