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

### THIRD ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-03470-4

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COUNSEL: NONE

HEARING REQUESTED: YES

### APPLICANT'S REQUEST

The Board reconsider his request for the following:

1. His nonjudicial punishment (NJP), dated 22 Aug 19, be removed from his records and he be reimbursed the forfeited pay.
2. He receive a direct promotion to the grade of lieutenant colonel (O-5).
3. He be awarded a Meritorious Service Medal (MSM) for his permanent change of station (PCS) assignment in 2020.

He also makes the following new requests:

1. His letter dated 11 Feb 23 to the CY23B Lieutenant Colonel Line of the Air Force (LAF) Central Selection Board (CSB) (P0523B) be removed from his officer selection record (OSR).
2. His letter to the special selection board (SSB) be accepted.
3. He be reimbursed attorney fees.

### RESUME OF THE CASE

The applicant is a currently serving Air Force major (O-4).

On 22 Aug 19, the applicant received an Article 15. At the time the NJP was served and before the Board adjudicated his initial AFBCMR request, the AF Form 3070, *Record of Nonjudicial Punishment Proceedings (Officer)*, included three specifications as follows:

- a. On 28 Nov 18, he knowingly and wrongfully distributed a recording of the private area of captain (O-3) SK, when he knew or reasonably should have known the said recording was made without her consent and under circumstances in which she had a reasonable expectation of privacy.
- b. Between 1 Jul 18 and 31 Jul 18, he knowingly, wrongfully and without the explicit consent of SK showed to LH an intimate visual image of her, such conduct unbecoming an officer and gentleman.

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- c. On 28 Nov 18, he communicated to NB and AK, in writing, indecent language in reference to SK.

Punishment included forfeiture of \$3,618 pay per month for two months. The portion of forfeiture in excess of \$3,618 pay per month for one month was suspended through 21 Feb 20, which after that time would be remitted without further action, unless sooner vacated. The applicant was also reprimanded. The reprimand states he chose to degrade a fellow airman and officer by sharing private sexual images of her, and to insult and defame her amongst other military members. He undoubtedly failed to live up to the bare minimum limits. Any skill he may have as an aviator did not and could not excuse such deficiencies in virtue or failure to live up to basic requirements of decency. His conduct, and inability to even recognize the wrongfulness raised serious doubt as to whether he could be trusted as an officer, let alone as a field grade officer.

The applicant in his response, dated 7 Oct 19, stated the statements were false and/or was the result of his commander's denial of his civil rights and due process. He would continue to pursue resolution and justice.

On 19 Feb 20, the applicant received a referral officer performance report (OPR) for the period of 27 Apr 19 to 19 Feb 20. It stated he received an Article 15 for wrongfully distributing an indecent visual image in violation of Article 120c, Uniform Code of Military Justice (UCMJ).

The AF Form 3212, *Record of Supplementary Action Under Article 15, UCMJ*, dated 7 May 21, reflects the portion of his NJP, which called for forfeitures in excess of \$1,000 pay per month for two months and a portion of the reprimand was set aside. In a letter dated 7 May 21, the numbered air force commander (NAF/CC) stated while he found the chain of command's action and outcome reasonable and appropriate given the evidence weighed and the legal opinions provided, he determined a portion of the evidence derived from the investigation by the Air Force Office of Special Investigation (AFOSI) to substantiate the NJP action was illegally obtained. Therefore, he executed a partial set aside of his Article 15.

On 17 May 22, the Board considered and partially granted the applicant's request. While DAF/JA recommended denial for removal of the NJP, the Board recommended the applicant's AF Form 3070, imposed on 22 Aug 19, be amended to show Specifications 1 and 3 were redacted in accordance with the NAF/CC's supplementary action setting aside two of the findings. However, the Board found insufficient evidence to remove the NJP in its entirety since the Board found no evidence the applicant did not commit the misconduct of showing an intimate visual image of SK. In this respect, the Board agreed with the rationale and recommendation of DAF/JA. The applicant in this case provided a statement from LH, dated 27 Aug 19, which stated he believed a picture of the nude nature he viewed of SK was accidental and that he did not believe the applicant intentionally showed it to him. The applicant was apologetic for the incident.

As recommended by the Board, on 20 Feb 23, SAF/MRB signed the AFBCMR Directive to redact specifications one and three of his NJP. The applicant's AF Form 3070 contained in his automated records management system (ARMS) record reflects the specifications redacted as directed by the AFBCMR. A portion of the reprimand pertinent to the redacted specifications was also redacted. The AFBCMR directive is filed in his ARMS record.

On 18 May 23 and 27 Jun 23, the Board reconsidered and again denied his request. The applicant provided an updated sworn statement from LH dated 20 May 21, which stated he was not confident his AFOSI interview and text message conversations with the applicant represented the truth and he was not certain the photo in question contained any nudity. The applicant also contended SK committed the same misconduct but was not punished. The Board did not find the new evidence

persuasive to conclude the applicant did not commit the misconduct. The Board also found no evidence he was treated disparately or that the referral OPR was not accurate.

On 16 Nov 23, the Board again considered and denied the applicant's request. The applicant submitted an updated sworn statement from LH, dated 25 Aug 23, which states the applicant did not knowingly or wrongfully show him any intimate visual images of SK and that the applicant should not have been charged as only he and the applicant could know the alleged incident occurred. The Board found LH's 25 Aug 23 and his previous 20 May 21 sworn statement insufficient to conclude the applicant did not commit the offense of showing an indecent visual image of SK. Since the Board found the new evidence insufficient, the Board denied the request for removal of the NJP and removal of the referral OPR. The Board also found the applicant had not exhausted the administrative remedy for award of the MSM in accordance with 10 U.S.C. § 1130. The Board also noted it was without authority to grant a direct promotion to the grade of O-5 as this authority remained with the President and Senate.

On 29 Jan 24, AFPC informed the applicant the Evaluation Report Appeals Board (ERAB) granted the applicant's request the referral OPR for the period of 27 Apr 19 to 19 Feb 20 be removed from his record. The ERAB found in view of the AFBCMR's removal of two of the three specifications, which concluded the evidence was obtained illegally, the evaluation should be removed. The applicant was further advised AFPC was directing an SSB be convened to consider him for promotion by the P0523B CSB.

The applicant's ARMS record includes AF Form 77, *Letter of Evaluation (LOE)*, which states the OPR for the period of 27 Apr 19 to 19 Feb 20 was removed and the applicant was not rated for the period.

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 M.

On 28 May 24, the applicant requested reconsideration of his request. He states he was notified on 28 May 24 his SSB for promotion to the grade of O-5 cannot accept his letter to the SSB without the AFBCMR removing the original letter to the original CSB. The letter should be removed as it contains material the AFBCMR previously removed and redacted. His SSB is scheduled for 24 Jun 24. The AFBCMR already directed the removal and redaction of most of his NJP.

In further support of his request, he provides his letter to the P0523B LAF-A Lieutenant Colonel CSB, dated 11 Feb 23, a letter from his commander, dated 20 Mar 24, regarding his duty performance, sworn statement from LH and other documents related to his request.

The applicant's complete submission is at Exhibit N.

On 4 Jun 24, the applicant was informed and he acknowledged he was nonselected for promotion to the grade of O-5 by the CY24 Lieutenant Colonel LAF CSB but he was selected for continuation.

On 8 Jul 24, the applicant accepted continuation to serve on active duty until qualified for retirement as an officer (20 years active military service and 10 years active commissioned service) or age 62, whichever date is earlier.

The military personnel data system (MilPDS) reflects his mandatory separation date is 31 Aug 29.

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

Per 10 U.S.C. § 624(a), When the report of a selection board is approved by the President, the Secretary of the Military Department concerned shall place the names of all officers approved for promotion within a competitive category on the promotion list. 10 U.S.C. § 624(c), Appointments under this section shall be made by the President, by and with the advice and consent of the Senate. The Board, which serves on behalf of the Secretary of the Air Force (SECAF), is without authority to promote an officer.

DAFI 36-2501, *Officer Promotions and Selective Continuation*, paragraph 6.2.1, the AFBCMR or a federal court can direct an officer for consideration by special selection board (SSB).

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, 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.

AFMAN 36-2806, *Military Awards; Criteria and Procedures*, paragraph 3.19, Recommendations (to include reconsiderations and upgrades) submitted after the applicable time limitation are only considered if submitted pursuant to 10 U.S.C. § 1130. This legislation allows consideration of recommendations submitted beyond the time limitation. Paragraph 3.19.1., Requests are made by someone other than the member, who has firsthand knowledge of the acts or achievements. Every effort should be made to obtain an endorsement from someone in the member’s chain of command at the time of the act, achievement or service was performed. Paragraph 3.19.2., Procedure. The requester submits a written request to a member of Congress for endorsement on a recommendation, pursuant to 10 U.S.C. § 1130. Recommendations should include a narrative justification, citation, eyewitness statements and supporting documents. The member of Congress endorses the recommendation and submits it to the Air Force Legislative Liaison Office.

DAFI 36-2603, *Air Force Board for Correction of Military Records*, Paragraph 7.2.4., Payment of Expenses. The Air Force has no authority to pay expenses of any kind incurred by or on behalf of an application in connection with a correction of military records under 10 U.S.C. § 1034 or § 1552. This includes attorney’s fees or other costs related to an AFBCMR application.

## **AIR FORCE EVALUATION**

AFPC/DPMSP (Officer Promotions) recommends approval for removal of the applicant’s original letter to the promotion board. The applicant is entitled to SSB consideration within P0523B LAF-A CSB. The existence of this document within his records has been verified.

The complete advisory opinion is at Exhibit N.

## **APPLICANT’S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 21 Oct 24 for comment (Exhibit Q), and the applicant replied on 21 Oct 24. In his response, the applicant acknowledged receipt of the advisory opinion and confirmed the advisory opinion was just for the removal of the letter to the SSB but his entire submission would be considered, to include removal of the NJP, return of the confiscated funds, award of an MSM, promotion to the grade of O-5 and reimbursement of attorney fees.

The applicant's complete response is at Exhibit R.

## **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 concurs with the rationale and recommendation of AFPC/DPMSP and finds a preponderance of the evidence substantiates the applicant's contentions in part. Specifically, the Board notes the applicant will receive SSB consideration within the P0523B LAF-A CSB for the ERAB's removal of his OPR ending 19 Feb 20 from his records. Accordingly, the Board concurs with the AFPC/DPMSP recommendation his original letter to P0523B LAF-A CSB be removed and he be permitted to write a new letter to the SSB. However, the Board remains unconvinced the evidence presented demonstrates an error or injustice to warrant granting any additional relief. With respect to the request for removal of his NJP, the Board finds the sworn statements provided by LH not persuasive to find the applicant did not commit the misconduct of showing him an intimate visual image of SK. While LH provided a sworn statement in the applicant's requests to the AFBCMR, the Board finds the inconsistent and changing statements not compelling to grant relief. In this respect, LH on 27 Aug 19, stated he believed the nude photos he viewed were accidental. On 20 May 21, he stated he was not confident the photo in question contained nudity. Then on 25 Aug 23, he stated the applicant did not knowingly or wrongfully show him a nude photo of SK and that only he and the applicant could have known the incident occurred. Further, the applicant's records show the NAF/CC carefully reviewed the circumstances of the NJP and redacted two of the three allegations based on the AFOSI obtaining some of the evidence illegally. The Board then in his prior case corrected the AF Form 3070 to reflect the supplementary actions of the NAF/CC. The Board finds based on the evidence, the applicant was provided proper and fitting relief and finds insufficient evidence to warrant removal of the NJP in its entirety. While the Board acknowledges the ERAB removed his referral OPR ending 19 Feb 20 based on the NAF/CC's finding AFOSI obtained some evidence illegally and the AFBCMR Directive removing two of the three allegations, the Board does not find the ERAB's removal of the referral OPR sufficient to warrant removal of the NJP or to conclude the applicant did not wrongfully show LH a nude photo of SK. The applicant also requests a direct promotion to the grade of O-5; however, this Board, which serves on behalf of the SecAF in the correction of records is without authority to grant the applicant a direct promotion to the grade of O-5 per 10 U.S.C. § 624(a). The applicant also requests he be awarded an MSM for his PCS; however, as pointed out in the applicant's prior case, the applicant has not provided evidence he exhausted the administrative remedy for award of the MSM in accordance with 10 U.S.C. § 1130. The applicant also requests he be reimbursed attorney fees. However, in accordance with DAFI 36-2603, the Board is unable to grant payment of expenses and has no authority to pay expenses of any kind, to include attorney's fees. Therefore, the Board recommends the applicant's records be corrected as indicated below.

## **RECOMMENDATION**

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

1. His original letter to the P0523B LAF-A CSB contained in his Personnel Records Display Application (PRDA) board record and his OSR be removed.
2. He be permitted to write a new letter to the SSB for the P0523B LAF-A CSB.

However, regarding the remainder of the applicant's request, the Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the application will only be reconsidered upon receipt of relevant evidence not already considered by the Board.

## CERTIFICATION

The following quorum of the Board, as defined in DAFI 36-2603, paragraph 2.1, considered Docket Number BC-2021-03470-4 in Executive Session on 19 Dec 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 M: Record of Proceedings, w/ Exhibits A-L, dated 4 Dec 23.  
Exhibit N: Application, DD Form 149, w/atchs, dated 28 May 24.  
Exhibit O: Documentary evidence, including relevant excerpts from official records.  
Exhibit P: Advisory Opinion, AFPC/DPMSPP, dated 4 Oct 24.  
Exhibit Q: Notification of Advisory, SAF/MRBC to Applicant, dated 21 Oct 24.  
Exhibit R: Applicant's Response, w/atchs, dated 21 Oct 24.

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.

1/29/2025

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Board Operations Manager, AFBCMR

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