

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-03688

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 letter of reprimand (LOR) dated 14 Nov 19, be removed from his records.
2. He receive an appropriate permanent change of station (PCS) decoration for his tour.
3. He receive special selection board (SSB) consideration for promotion to the rank of colonel (O-6).

APPLICANT'S CONTENTIONS

During his command of a unit in the ANG, the wing commander (WG/CC) issued him a LOR for wearing a non-offensive Halloween costume to wing staff meeting. Four weeks prior to receiving the LOR, he informed the WG/CC he was filing an inspector general (IG) complaint regarding the unit alignment and a readiness issue. The LOR was in reprisal and his complaint was never properly investigated. An external investigation conducted by the Secretary of the Air Force Office of Diversity and Inclusion (SAF/ODI) resulted in removal of the WG/CC and vice wing commander (WG/CV). The SAF/ODI in an email dated 27 Apr 21 to his new commander stated based on the wrongs that happened at the wing, he would bet his reputation on him over the WG/CC. The WG/CC enjoyed making sure he understood the LOR spawned from what he perceived as insubordination on the readiness alignment issue. He appealed to the DOD/IG to no action. Prior to arrival of this WG/CC, he was stratified #1 of 5 commanders.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is an Air Force Reserve lieutenant colonel (O-5).

The applicant performed a period of duty in the Regular Air Force from 28 May 03 to 2 Jun 16. The applicant's request for palace chase was approved and he was honorably discharged for intradepartmental transfer. He was credited with 13 years and 5 months of active duty service.

On 3 Jun 16, the applicant entered a period of active duty as an Active Guard Reserve (AGR) with the ANG in accordance with 32 U.S.C.

On 18 Oct 19, the applicant filed an AF Form 102, *Inspector General Complaint Form*, regarding ongoing issues since the 2008 squadron activation order and that the unit was aligned

under the mission support group (MSG) without an organizational change request (OCR). The applicant named the State ANG/CC, WG/CC and the MSG/CC in his complaint.

SAF/IG provides IG case analysis. On 17 Nov 19, the State Office of the Inspector General (OIG) completed an analysis of the applicant's 18 Oct 19 IG complaint and recommended an IG investigation not be conducted. The applicant contended his unit was not properly aligned and was in violation of AFI 38-101, *Manpower and Organization*. On 17 Nov 19, the OIG informed the applicant his complaint dated 18 Oct 19 pertaining to the alignment of his squadron was closed. The case was dismissed under AF 90-301, *Inspector General Complaints Resolution*, Table 3.13, Rule 2 (Complaint not a matter for the IG).

On 14 Nov 19, the applicant received a LOR. The LOR stated on 1 Nov 19, he attended the wing staff meeting dressed in a pink unicorn costume and had his acting squadron superintendent also dress in a Halloween costume. His actions were disrespectful. The WG/CC also learned that the applicant's squadron was the only squadron that did not watch the October WG/CC's All Call video during drill weekend. The videos were the primary means the WG/CC and command chief communicated to the airmen in the wing. The actions taken together indicated a rising and alarming level of insubordination. The applicant was reprimanded and instructed to never attend a wing staff meeting dressed in anything other than the uniform of the day without prior coordination and permission. The LOR also stated he was previously issued a letter of admonishment (LOA). The LOR was filed in the applicant's officer selection record (OSR).

In the applicant's response to the LOR dated 20 Nov 19, he states the LOR was in reprisal for his IG complaint on how the State ANG had been running an "off the books" chain of command for 10 years. The unit's full time staff had worn Halloween costumes to work for the past three years as a morale event similar to other units. On 31 Oct 19, his unit was requested to provide assistance for a Junior Reserve Officer Training Corps (JROTC) event. Since it would not be appropriate to host a JROTC event in costume, the unit costume event was rescheduled for the following day. The following morning, their unit aided in the restoration of a power outage due to a windstorm and did not dress in costume until the afternoon. Later that day, the wing staff meeting was changed from 0900 to 1400. He took full responsibility for the decision to wear costumes to staff meeting and thought it would be comical as he and his superintendent are typically serious in meetings. He would not have done it had he known it would be considered disrespectful. With respect to his unit not viewing the Oct command videos, this was the first feedback he received that it was a concern. It had been an ongoing practice for three and a half years to share information in 5 to 10 minute unit formations that did not include any slides or videos. He was shocked to receive a severe career ending administrative action. The costume incident occurred two weeks earlier and the video was more than six weeks earlier. The LOR was not proportionate and was in reprisal.

On 17 Jul 20, the applicant was honorably discharged from the ANG and transferred to the Air Force Reserve, effective 18 Jul 20. He was credited with 4 years, 1 month and 15 days of active duty service.

The applicant provides an email from the SAF/ODI, dated 27 Apr 21 to the applicant's current joint forces commander suggesting the applicant's whistleblower reprisal complaint had merit but that it had to make it through the wickets in the SAF/IG. He stated at the end of Jan 21, he completed an investigation of the WG for a separate case and found much wrong at the base and within the command. The WG/CC and vice wing commander (WG/CV) and a few other officers were relieved after he briefed the State National Guard senior leadership on his findings. Based on the information he uncovered, he would bet his reputation on the applicant over the WG/CC.

On 12 Aug 21, the DOD Office of Inspector General (OIG) informed the applicant his complaint of reprisal did not warrant an investigation and the case was closed. The evidence supported that

the LOA and LOR were for specific acts of misconduct that the applicant admitted to. Additionally, the applicant appealed the severity of the actions to the next higher level commander who did not consider the punishments excessive. Lastly, his protected communication concerning the alignment of his unit was considered and determined the current assignment was within regulations and would not be changed. The applicant was advised he could request further review by the AFBCMR.

The applicant provides an email from an individual from a non-government email address. The email states they were employed in 2021 by the DOD OIG Whistleblower Reprisal Investigations Office as a senior investigator. The applicant's case was one of two cases he evaluated from the State ANG. Both cases included a hostile work environment and culture established by the WG/CC. He was told the report on the WG/CC would not be included in the applicant's case, nor would the information be shared with the SAF/IG. In the end, the DOD OIG upheld the original decision to dismiss the applicant's case regardless of new evidence. In his opinion, the lack of consideration demonstrated a possible cover up.

The military personnel data system (MilPDS) reflects the applicant has one non-selection, in the promotion zone (IPZ), for the rank of colonel.

The MilPDS and applicant's DD Forms 214 for the periods ending 2 Jun 16 and 17 Jul 20 show the applicant has been awarded a total of four Meritorious Service Medals (MSM), MSM with three oak leaf clusters (MSM w/3 OLCs).

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.

DAFI 36-2803, *Military Decorations and Awards Program*, paragraph 2.1.10. Immediate supervisors and commanders evaluate all related facts regarding the service of a member before recommending or approving an award. Meritorious service awards: individual performance that exceeds that expected by virtue of grade and experience, based on accomplishments during an entire tour of duty.

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 SSB.

DAFPM 2021-36-03, *Adverse Information for Total Force Officer Selection Boards*, dated 14 Jan 21 and Section 502 of the National Defense Authorization Act (NDAA) for Fiscal Year 2020, signed on 20 Dec 19, as codified in 10 U.S.C. § 615(a)(3) requires all adverse information to be filed in an officer's master personnel records group and OSR for consideration by promotion boards. The new policy removed the authority for WG/CCs or issuing authorities to direct removal of derogatory data from the OSR effective 1 Mar 20, as previously permissible in AFI 36-2907, *Adverse Administrative Actions*, and AFI 36-2608, *Military Personnel Records*. Adverse information requiring mandatory filing in the OSR and master personnel records group includes, but is not limited to LORs and any substantiated adverse finding or conclusion from an investigation or inquiry. Only the AFBCMR may remove the adverse information from the officer's record.

AIR FORCE EVALUATION

DAF/JA recommends rescinding and removing the LOR from the applicant's record and recommends review of any LOAs that may have been issued. DAF/JA makes no recommendation for the request of a supplemental board as that is beyond the scope of a military justice review.

The State ANG/IG review reveals troubling indications of possible error or injustice by the applicant's wing commander in the administering of the various disciplinary actions. Further, the State ANG/IG's office's investigation into the applicant's reprisal allegation is also concerning, if not erroneous or unjust. In consideration, DAF/JA recommends granting the request for removal of the LOR.

On 4 Nov 19, the applicant was an ANG squadron commander (SQ/CC) and received a LOR on 14 Nov 19 from his WG/CC. The reasons were on 1 Nov 19, the day after Halloween, he and his squadron superintendent wore costumes to the wing staff meeting. The LOR described the applicant as wearing a "pink unicorn costume." The LOR also stated that the WG/CC learned the applicant's squadron did not watch the drill weekend commander videos. The LOR stated his actions indicated a rising and alarming level of insubordination and disrespect. The LOR references a LOA issued the previous year.

On 18 Oct 19, two weeks prior to the Halloween costume incident, the applicant filed an IG complaint, with his WG/CC's awareness, regarding the wing's organizational misalignment and the WG/CC on two occasions denied the applicant's requests to correct the error which was the primary culprit behind the applicant's squadron's deficiencies in mission readiness.

The State ANG IG analysis alludes to poor decision making by the applicant and the progressive discipline process but does not provide specifics. However, based on the evidence, it appears there was an incident involving the use of a government credit card. The LOA for the government credit card appears to be based on the applicant's decision to authorize a purchase of a pressure washer necessary to clean mold and mildew on tents in order to preclude a loss of \$864,000 due to uninhabitable tents. The applicant's superintendent provided an email to offer details of the lead contamination. The applicant was administered a verbal counseling regarding the movement of equipment and vehicles ordered by the superintendent. The applicant was unaware the superintendent had given contrary orders.

Unlike in other cases, the applicant's infractions were the result of his attempt to accomplish the mission or to improve the circumstances of his subordinates. The outlier is the alleged failure to ensure his unit completed their video training; however, the unit received the same information disseminated via other means was not egregious and was more likely not a pretext by the WG/CC to issue an LOR, which is generally acknowledged as a "career killer" for officers. The SAF/ODI 27 Apr 21 email supports the applicant's whistleblower reprisal case and expressed his disapproval of the WG/CC. Due to the unusual nature of an email from a third party general officer, DAF/JA followed up with the SAF/ODI. He disclosed he investigated an unrelated matter involving the wing and observed "a pattern of vindictiveness regarding the WG/CC." He was unambiguous he observed dysfunctional and toxic leadership that engaged in vindictive reprisal against subordinate members.

Based on the understanding of the vindictive command climate, the applicant's repeated efforts to fix a broken organizational structure (to include an IG complaint), the close timeframe between the applicant's IG complaint and the LOR for the minor nature of the applicant's misconduct and the seriousness of the LOR's impact; DAF/JA disagrees with the DOD OIG email dated 12 Aug 21 that the applicant's reprisal complaint did not warrant investigation because the applicant's LOA and LOR were for misconduct the applicant admitted to. This is the incorrect standard of review for reprisal actions. Hence, DAF/JA finds error in the reprisal analysis. DAF/JA also disagrees with the State ANG IG 12 Feb 20 recommendation to dismiss

the applicant's complaint stating they could not make a causal connection between the protected communication and personnel action. The question should solely have been based on whether the personnel action would have occurred but for the protected communication.

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 19 Jul 22 for comment (Exhibit E), and the applicant replied on 24 Jul 22. He concurs with the DAF/JA advisory to remove the LOR and shares the concern that the IG dismissed his complaint and not conduct an investigation.

He submitted an updated DD Form 149, *Application for Correction of Military Record*, on 17 Dec 21 because his application dated 21 Nov 21 was returned for not clearly stating the corrections he would like. The updated DD Form 149 included the same information; however, included the addition of the DOD OIG senior investigator. He conducted an analysis and reached a similar conclusion as the DAF/JA. He requests removal of the LOR, award of a PCS decoration and SSB to the rank of colonel. He understands that the award of a decoration is discretionary. The decision of the WG/CC to deny him a PCS medal has created a "red flag" in his record. He was stratified #1 of 5 squadron commanders prior to the arrival of the WG/CC. He spent three years navigating a thin line between respecting the WG/CC's authority and insulating the unit from unethical and illegal schemes. A Meritorious Service Medal (MSM) is typically an appropriate decoration for a graduated squadron commander and is what a promotion board would expect to view in his record.

With regards to a SSB, a possibility exists the Board's decision may not be implemented before his above the promotion zone (APZ) board scheduled to convene in Oct 22. Should the Board decide his case warrants an SSB, he requests he be considered for SSB for his IPZ and APZ promotion boards.

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 concurs with the rationale and recommendation of DAF/JA and finds a preponderance of the evidence substantiates the applicant's contentions. The Board notes the applicant did wear a Halloween costume to the wing staff meeting and did not have his unit view the WG/CC video, the reasons for which he received the LOR dated 14 Nov 19. However, the Board does not find the minor infractions sufficiently egregious to warrant a career ending LOR. The Board finds it reasonable to conclude the applicant would not have worn the Halloween costume to staff meeting had he known the WG/CC would have found it disrespectful. Moreover, it appears it was a customary annual event for the applicant's unit and other units to wear Halloween costumes. With respect to the video, the Board finds the applicant should have required his unit to view the WG/CC video if it was a mandatory requirement. However, it appears the convening of unit formations was the typical method used to share information. The Board finds the issuance of the LOR was disproportionate for the minor infractions and the minor infractions could have easily been remedied through verbal counseling. While the Board notes the State ANG/IG and the DOD IG declined to investigate the applicant's complaint of reprisal; the Board finds the SAF/ODI 27 Apr 21 email to the applicant's new commander sufficient to conclude it was more likely than not that the applicant was issued the LOR in retribution for making protected communication. The Board notes DAF/JA recommends removal of the LOR and any LOAs; however, there are no LOAs in the applicant's records. While DAF/JA does not make any recommendations for award of an MSM or SSB consideration for promotion to the rank of colonel, the Board finds based on the recommendation for removal of the LOR and in the interest of justice, the applicant should be awarded an MSM for his tour from 3 Jun 16 to 17 Jul 20 and that he be considered for promotion to the rank of colonel by an SSB. Therefore, the Board recommends correcting the applicant's records as indicated below.
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 pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show

- a. The letter of reprimand (LOR) dated 14 Nov 19 be removed from his records.
- b. His record be updated to show award of the Meritorious Service Medal, with fourth oak leaf cluster (MSM w/4 OLC) for the inclusive period 3 Jun 16 to 17 Jul 20.
- c. He be considered by a special selection board (SSB) for promotion to the rank of colonel by the Calendar Year 2021 (CY21) Air Force Reserve Line and Non-line Colonel Promotion Selection Board. If not selected for promotion, he be considered by a SSB for the CY22 Air Force Reserve Line and Non-line Colonel Promotion Selection Board, if applicable.

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-2021-03688 in Executive Session on 30 Aug 22:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit A: Application, DD Forms 149, w/atchs, dated 21 Nov 21 and 17 Dec 21.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: IG Case Analysis, w/atchs, dated 17 Nov 19 (WITHDRAWN)
Exhibit D: Advisory opinion, DAF/JA, dated 27 Jun 22.
Exhibit E: Notification of advisory, SAF/MRBC to applicant, dated 19 Jul 22.
Exhibit F: Applicant's response, w/atchs, dated 24 Jul 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.

X

Board Operations Manager, AFBCMR