

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-03698

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

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

1. He be retroactively promoted to the rank of lieutenant colonel (O-5), with date of rank (DOR) and effective date 19 Sep 19, by the U0519A Air Force Reserve Promotion Vacancy (PV) Lieutenant Colonel Selection Board.
2. He be provided back pay and allowances for the pay differential commensurate with the higher grade.
3. His referral officer performance report (OPR), with close out date 11 Jun 20 be void and removed from his record.
4. His promotion recommendation form (PRF), dated 23 Apr 20 be removed from his records.
5. He be retroactively placed on active duty orders from 1 Oct 19 to 28 Feb 20.

APPLICANT'S CONTENTIONS

In early 2019, he was ordered to report to the Office of Special Investigations (OSI) and was arrested and charged with prostitution, adultery and fraternization. On 4 Oct 19, his commander offered him nonjudicial punishment (NJP). He accepted the offer of NJP but after submitting his oral and written response, he was advised new evidence had come to light and on 5 Nov 19, the Article 15 offered was withdrawn. He was offered a revised Article 15 and it was clear to him he would not be treated fairly. He turned down the Article 15 and demanded trial by court martial. The court martial began on 11 Jan 21 and he was found not guilty on all charges and specifications. The charges were completely false and he did not commit the actions. The panel deliberated and returned a verdict in less than 20 minutes.

He was an individual mobilization augmentee (IMA) during this time and reported daily for duties. In Jan 19, he started in the mission director position when a promotion recommendation form (PRF) with a definite promote "DP" recommendation and the "#1" stratification was accomplished. The commander ultimately made the decision to not forward the PRF to the

USAFR PV Line and Non-line Lieutenant Colonel Promotion Selection Board. He later learned the reason the PRF was not forwarded was due to the OSI investigation and pending charges. He would have been promoted had it not been for the false charges.

The following year, prior to any hearings regarding the charges, he received a referral OPR for fraternization and an extramarital affair with an enlisted member. The statement was factually incorrect and damaging. At the time of the report, the allegation had not been substantiated by an Article 32 hearing or court martial. Both have now taken place and he was acquitted.

In accordance with AFI 36-2406, *Officer and Enlisted Evaluations Systems*, he requested the evaluation report appeals board (ERAB) replace the OPR with the one signed by the rater and the additional rater. However, the reviewer (commander), refused to sign the report. The decision of the reviewer to not sign the OPR was in reprisal following his inspector general (IG) and Congressional complaints. The ERAB returned his application without action stating he would need to provide credible, reliable and relevant supporting documentation. He was subsequently passed over for promotion during the 2020 promotion cycle. The ERAB did not review the complete and proper record at the time of the board and their actions were inappropriate. They contacted his supervisor by email requesting copies of his rebuttal. He submitted a Freedom of Information Act (FOIA) to obtain documents pertaining to his ERAB application but the FOIA request came back denied with reason as “no records found.”

He was an IMA and expected to continue in his duties until his court martial. However, on 29 Sep 20 his orders were disapproved in AROWS-R stating there was a pending legal deployment availability code in the military personnel data system (MilPDS) preventing placement on military personnel appropriation (MPA) orders. He also lost his security clearance. His family endured an enormous financial burden.

He was again eligible for promotion by the CY21 Lieutenant Colonel Board. On 6 May 20, he received his PRF. He received a “Promote” recommendation with stratification “8/8.” He anticipated he would be selected for promotion; however, he was a nonselect when results were released on 14 Oct 21. He later learned a board member influenced the results of the outcome.

The accuser admitted to the false accusations and the court martial found him not guilty but the system has not provided a remedy and he continues to receive unfair assessments of his performance due to the past evaluations.

The applicant’s complete submission is at Exhibit A.

STATEMENT OF FACTS

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

Per his DD Forms 214, *Certificate of Release or Discharge from Active Duty*, the applicant performed a period of active duty from 1 Oct 18 to 18 Sep 19. He was released from active duty, with a narrative reason for separation of “completion of required active duty.” He was credited with 11 months and 18 days of active duty service. On 1 Oct 19, he entered another period of

active duty and was released from active duty on 30 Sep 20, with a narrative reason for separation of “completion of required active duty. He was credited with one year of active duty service.

The applicant’s reprisal complaint (AF Form 102, *Inspector General Complaint Form*) dated 14 May 20 was reviewed by the Board per 10 U.S.C. § 1034. The applicant alleged his commander on 12 May 20 informed him he was issuing his a “Do Not Promote” PRF. When he asked why the PRF was being issued before the hearing had convened, his commander responded he reviewed the evidence and had already made up his mind. The applicant requested his PRF be reaccomplished as his commander’s statement bypassed the legal system and resulted in harm to his career.

Per the SAF/IGS memorandum dated 26 May 20, SAF/IGS started an initial inquiry into the applicant’s complaint dated 14 May 20. The inquiry revealed his commander acted in accordance with applicable guidance and within his discretion. Specifically, the inquiry determined the promotion recommendation and the comment regarding his misconduct on the 2020 PRF were based on relevant information and was within the commander’s discretion. Accordingly, there was insufficient evidence to indicate wrongdoing and an inadequate basis to warrant further investigation. Therefore, the applicant’s complaint was dismissed.

The applicant provides PRF dated 23 Apr 20, showing he received a Do Not Promote “DNP” promotion recommendation for the V0520A Lieutenant Colonel Promotion Board. The reason for the “DNP” was misconduct (fraternization and extra marital affair with an enlisted member).

The applicant received a referral OPR for the reporting period 12 Jun 19 to 11 Jun 20. The OPR stated the applicant disclosed during the period, he engaged in fraternization with an enlisted member.

The Entry of Judgement of *United States v Applicant* dated 14 Jan 21, shows a general court martial was convened on 13 Jan 21. The applicant pled not guilty and was found not guilty of the charges and specifications as follows:

CHARGE I: Article 107, Plea: Not Guilty, Finding Not Guilty.

Specification 1: On or about 28 Oct 19, with intent to deceive, make to his commander an official written statement, which was known to be false by the applicant he never met, spoke to or communicated electronically with the alleged enlisted member he was accused of having an extramarital affair with.

Specification 2: On or about 28 Oct 19, with intent to deceive, make to his commander a verbal official statement, which was known to be false by the applicant he never met, spoke to or communicated electronically with the alleged enlisted member he was accused of having an extramarital affair with.

CHARGE II: Article 134, Plea: Not Guilty, Finding Not Guilty.

Specification I: On 30 Jun 19, he engaged in sexual activities with the alleged enlisted member.

Specification 2: The applicant, a married person, between 1 Jan 19 and on or about 30 Dec 19, wrongfully engaged in extramarital conduct with an enlisted member who was not his spouse.

He provides a memorandum from the Reserve Advisor to the Operations Center/Senior Director of Operations dated 2 Feb 21, stating he worked with the directors to ensure promotion packages were submitted correctly and on-time and would conduct cross directorate reviews. In the spring of 2019 a review was conducted for the PV promotion board and the applicant was the panel's number one recommended choice for promotion. As the Reserve Advisor, he asked the commander as to why the applicant's package was not forwarded and was advised that there was an ongoing investigation and there was no resolution to the allegations.

The unsigned memorandum from the Director of Operations dated 18 Feb 21 provided by the applicant states a replacement OPR was drafted and signed by the original rater and additional rater. However, the reviewer was unwilling to sign the replacement OPR.

On 8 May 21, the ERAB denied the applicant's request the referral OPR be removed. The ERAB was not convinced the original OPR was unjust or wrong as written.

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

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. The applicant's IG complaint of reprisal was included in the case and considered by the Board per 10 U.S.C. § 1034.

AIR FORCE EVALUATION

ARPC/DPTS recommends approval for removal of the referral OPR. While AFI 36-2406, paragraph 1.10.3.2, states the overall evaluation will be a "Does Not Meet Standards" rating and a referral report when an officer fails to meet standards in any one of the listed performance factors, based on evidence provided, the allegations on the OPR were inaccurate and not proven in court. The AF Form 707, *Officer Performance Report (Lt thru Col)*, may be replaced with an AF Form 77, *Letter of Evaluation*, as a gap report to show the applicant was not rated for the period of 2019-2020. Since the rater and additional rater have been willing to provide a new OPR, they may submit a new OPR and follow guidance under AFI 36-2406 paragraph 1.7.2 to remove the reviewer from the rating chain as there has been a complaint against him from the applicant.

AFI 36-2406, paragraph 1.7.2. Removal of Evaluator from Rating Chain. Evaluators are not removed from the rating chain based solely on a rating disagreement; nor are they removed from their evaluator responsibilities automatically. However, evaluators who are subject to a complaint of harassment or assault are prohibited from evaluating the complainant and will be removed from the complainant's rating chain. Cases involving threats of reprisal or retaliation are serious

allegations and has the potential to impede trust and readiness. Therefore, removing an evaluator from a rating chain for either of these reasons will be at the commander's discretion.

The complete advisory, with attachments, is at Exhibit D.

ARPC/PB recommends the applicant be granted a special board (SB) in lieu of the CY19 Air Force Reserve Line and Non-line Lieutenant Colonel PV board. If the applicant is selected by the SB, the DOR will be the public release date of the original board or 5 years' time in grade, whichever is later. The applicant was otherwise eligible to meet the CY19 Air Force Reserve Line and Non-line Lieutenant Colonel PV board and provided documents stating why a PRF was not submitted at the time he became eligible. If not selected on the PV board, ARPC/PB recommends the applicant be granted a special selection board (SSB) for the CY20 and CY21 Lieutenant Colonel Promotion Boards. The applicant was not submitted for a PV promotion due to an investigation that started in early 2019. However, the applicant was acquitted of all charges by a court martial on 13 Jan 21. The applicant submitted letters of support stating a PRF was submitted for the Jun 19 PV board and that he was assigned to an O-5 billet at the time of his eligibility.

In accordance with Air Force Instruction (AFI) 36-2504, *Officer Promotion, Continuation and Selective Early Removal in the Reserve of the Air Force*, PV promotion boards are not mandatory boards. If a senior rater has an officer they want to nominate and all eligibility factors have been met, they must submit a PRF to ARPC/PB by the set suspense date of 45 days prior to the board convening date. ARPC/PB does not have the authority to grant an SB for a late PV PRF.

The complete advisory is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 7 Jan 22 (Exhibit F). In a response dated 9 Feb 22, he contends it would be difficult, if not impossible, for a SB and SSB to be conducted in a fair and equitable manner. The PRF was never submitted and is not a part of his official record. As stated in the Reserve Advisor's memorandum dated 2 Feb 21, he held a stratification of "#1/XX" on the PRF. The selection rate for the PV board was 34 percent and the PRF would be critical to being competitive. Further, if SSBs were to be granted, his available records would not adequately represent his quality or character of service. There is also a potential for conflict that cannot be overlooked. The ARPC/CC was the former mobilization assistant to the commander and she assisted the commander on how to handle his case and court martial. He requests in lieu of referring his case to SB or SSB, the AFBCMR grant his request for promotion.

The applicant's complete response is at Exhibit G.

ADDITIONAL AIR FORCE EVALUATION

ARPC/JA recommends no relief be granted in full or in part. The review of the evidence and consideration of the ARPC/DPTS and ARPC/PB advisories do not demonstrate by a preponderance of evidence that the applicant was the victim of an error or injustice. The underlying reason for ARPC/DPTS supporting the removal of the OPR is based on the

mischaracterization of a not-guilty verdict at a court martial versus a false accusation. In the applicant's case, the accusation may have been true; however, there was insufficient admissible evidence to prove it beyond a reasonable doubt at a court martial, which is different from the standard for a referral OPR. Paragraph 1.12.4.1.1 of AFI 36-2406 states "raters must ensure that information used to document performance, especially derogatory information relating to unsatisfactory behavior or misconduct, is reliable and supported by a preponderance of the evidence." The preponderance of the evidence standard is more likely than not, the evidence tipping the scales over the 50 percent threshold that it happened vice that it did not happen. This is a much lower standard than the high criminal standard of beyond a reasonable doubt. If there was sufficient evidence to support proceeding to a UCMJ action, first an Article 15 and then a court martial after the applicant turned down the Article 15, there was evidence that exceeded the preponderance of the evidence standard supporting the administrative actions taken against the applicant. The DODI 1332.30, *Commissioned Officer Administrative Separation, Section 4.6(d)* states an acquittal or a not guilty finding in a civilian or military criminal proceeding does not preclude an administrative discharge action also holds true for administrative actions to include promotion board, PRF and a referral OPR.

The SAF/IGS memorandum dated 26 May 20 dismissed the applicant's complaint of reprisal. The inquiry revealed his commander acted in accordance with applicable guidance and within his discretion. The inquiry determined the PRF and comment regarding his misconduct was within his commander's discretion and there was insufficient evidence to warrant further investigation. While there are no legal concerns should the Board concur with ARPC/PB to grant a SB and SSB, ARPC/JA does not believe the AFBCMR can simply promote him to lieutenant colonel as a Secretary of the Air Force (SecAF) action at the AFBCMR.

Ultimately, ARPC does not find the applicant to be the victim of an error injustice but rather he is dissatisfied with how the evidence was evaluated administratively, with the preponderance of the evidence standard, rather than how the court martial and criminal proceedings applied the much higher standard of beyond a reasonable doubt.

The complete advisory is at Exhibit H.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 28 Apr 22 (Exhibit I). In a response dated 4 May 22, he disagrees with the ARPC/JA advisory. The entire premise of the argument ignores the basic principle that a member is considered innocent until proven guilty. He was forced to demand trial by court martial to demonstrate his innocence. The evidence revealed at trial that the only witness to the allegation was never at his home. The advisory also states the AFBCMR is unable to promote him without offering any insight on how conducting a SB or SSB could reasonably occur given the current circumstances. The SecAF may correct any military record when necessary to correct an error or remove an injustice. He requests the Board directly promote him in lieu of SB or SSB consideration.

The applicant's complete response is at Exhibit J.

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 ARPC/JA recommends denial for removal of the referral OPR stating a not guilty verdict at a court martial did not demonstrate the accusations the applicant engaged in sexual activities with an enlisted member were false. Rather, there was insufficient evidence to prove it beyond a reasonable doubt at a court martial. ARPC/JA also noted the applicant's IG complaint of reprisal was dismissed noting his commander acted in accordance with applicable guidance. Accordingly, there was also insufficient evidence to warrant removal of the PRF and grant SB and SSB for promotion to lieutenant colonel. However, the Board concurs with the recommendations of ARPC/DPTS and ARPC/PB and finds a preponderance of the evidence substantiates the applicant's contentions in part. Specifically, the applicant has provided sufficient evidence to warrant removal of the referral OPR, the DNP PRF and that he be considered for promotion to lieutenant colonel by a SB for the CY19 Air Force Reserve Line and Non-line Lieutenant Colonel PV Board and if not selected, he be considered by a SSB for the CY20 and CY21 Lieutenant Colonel Promotion Boards. While ARPC/DPTS and ARPC/PB did not recommend removal of any PRFs, based on the circumstances and the recommendation for SSB consideration, the Board finds it in the interest of justice to also remove the PRFs. In this respect, the applicant has demonstrated the allegations in the OPR were false and had it not been for the allegations, he would have been considered by a PV promotion board. Notably, when offered nonjudicial punishment proceedings, the applicant indicated he demanded trial by court-martial because he felt the need to prove his innocence. Such a bold move when combined with the total acquittal of all charges and specifications supports applicant's claim that the allegations against him were false. While ARPC/DPTS states the reviewer in the rating chain who refused to sign the replacement OPR can be removed from the rating chain based on the IG complaint and the replacement OPR be placed in the applicant's records, the Board reviewed the applicant's complaint and finds insufficient evidence of reprisal to do so. In this respect, the applicant has provided no evidence to show he was reprimed against in violation of 10 U.S.C. § 1034 and on 26 May 20, SAF/IGS dismissed the applicant's complaint. However, because the DNP PRF includes reference to the false allegations that member's misconduct (fraternization and extramarital affair with an enlisted member) and states that those allegations led to the DNP recommendation, the PRF should be removed from the applicant's record. The Board also recommends the applicant's 2021 PRF be removed. While it does not contain any derogatory comments, the PRF stratified the applicant 8 of 8, which may have been influenced by the prior unjust actions. The applicant also requests direct promotion to lieutenant colonel in lieu of SB or SSB consideration; however, as pointed out by ARPC/JA, this Board, which serves on behalf of the SecAF, in the correction of military records is without authority to appoint or promote officers. With respect to the request that he be awarded active duty orders for the period of 1 Oct 19 to 28 Feb 20, the Board notes the applicant's records include a DD Form 214 to show he was already credited for this period of service; subsequently, there is no action required by the Board. 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. AF Form 707, *Officer Performance Report (Lt thru Col)*, for the reporting period of 12 Jun 19 to 11 Jun 20 be void and removed from his records and replaced with an AF Form 77, *Letter of Evaluation*, which states "Not rated for the above period. Evaluation was removed by Order of the SecAF.
- b. His AF Forms 709, *Promotion Recommendation Form*, for the CY20 and CY21 Air Force Reserve Lieutenant Colonel Promotion Boards be removed from his records.
- c. He be considered by a special board (SB) for promotion for the CY19 Air Force Reserve Line and Non-line Lieutenant Colonel Position Vacancy (PV) Board.
- d. If not selected for promotion by the CY19 Air Force Reserve Line and Non-line Lieutenant Colonel Position Vacancy (PV) Board, he be considered by a special selection board (SSB) for the CY20 and CY21 Air Force Reserve Lieutenant Colonel Promotion Boards.

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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2021-03698 in Executive Session on 14 Jun 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 28 Nov 21.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: SAF/IGQ Provided AF Form 102, dated 14 May 20 (WITHDRAWN)
Exhibit D: Advisory opinion, ARPC/DPTS, w/atchs, dated 22 Dec 21.
Exhibit E: Advisory opinion, ARPC/PB, dated 6 Jan 22
Exhibit F: Notification of advisory, SAF/MRBC to applicant, dated 7 Jan 22.
Exhibit G: Applicant's response, dated 9 Feb 22.
Exhibit H: Advisory opinion, ARPC/JA, dated 22 Apr 22.
Exhibit I: Notification of advisory, SAF/MRBC to applicant, dated 28 Apr 22.

Exhibit J: Applicant's response, dated 4 May 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