

While it is appropriate to comment to some extent about the alleged misconduct, those comments are intended to document the behavior, not the evaluator's feelings about the behavior. Quite literally, no work performance is captured. The rater also failed to write comments that explain what the applicant did, nor did he write any objective performance-based comments that explain how the applicant contributed, or failed to contribute, to the mission.

This OPR fails to fulfill the purpose of the Officer Evaluation System and resulted in an injustice to both the Air Force and the applicant. The applicant is entitled to a fair evaluation based upon his objective performance.

“**Work-Pr...** rebounded sufficiently”. For the subsequent reporting period, 22 May 18 to 30 Apr 19, the applicant was subjected to negative language when the rater used this is impermissible comment. Comments in a report must be based upon performance during the rating period, unless a “rare” exception exists. To cite AFI 36-2406, paragraph 1.12.3.4, comments must be a significant addition to the evaluation; the comment must be negative; and if both above apply, the comment must also involve the character, conduct, or integrity of the ratee that continue to influence the performance of the ratee.

No rare exception applies. First, “rebounded” is not a significant addition. It is simply a descriptor, a “throw-away” comment intended to potentially compliment the ratee for his performance without being specific as to what he has accomplished. The term “rebounded” as used commonly, and clearly here, refers to recovering after a decline. It is clearly written here as the applicant rebounding from his previous alleged misconduct. There should be no reference in an OPR to behavior or performance in years past, even if positive. Negative references are even more problematic, referring to negative performance even when indicating a positive climb have negative connotations and would drive the reviewer to look back on previous rating periods even though each rating period should stand alone. This is not recently uncovered misconduct, nor does its inclusion add significantly to this report – it is simply misplaced and disallowed.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is an Air Force major (O-4).

On 21 May 18, the applicant receives a referral OPR for the rating period from 1 Sep 17 thru 21 May 18. Section IX, *Performance Factors*, has four (4) performance factors rated as “Does Not Meet Standards”.

On 21 May 18, the applicant provided his response to his referral OPR.

On 30 Apr 19, the applicant receives an OPR for the rating period from 22 May 18 thru 30 Apr 19. Section IV, *Rater Overall Assessment*, contains the statement “**Work-Pr...** rebounded sufficiently”.

On 12 Jul 21, according to documentation provided by the applicant, counsel applied on his behalf to the Evaluation Review Appeal Boards (ERAB), for the removal of the contested statement from his OPR, dated 30 Apr 19.

On 26 Jul 21, according to documentation provided by the applicant, counsel applied on his behalf to the ERAB, to void the referral OPR, dated 21 May 2018.

The applicant's Automated Records Management System (ARMS) record reflects that his referral response is attached to the 21 May 18 OPR.

APPLICABLE AUTHORITY/GUIDANCE

AFI 36-2406, *Officer and Enlisted Evaluation Systems*, 8 Nov 16:

1.12.3.4. Prior Events. Do not include comments regarding events which occurred in a previous reporting period, unless the events add significantly to the evaluation, were not known to and considered by the previous evaluators and were not previously reflected in an evaluation which is a part of the permanent record (this includes EPRs, OPRs, LOEs and TRs). **EXAMPLE:** An event (positive or negative) which came to light *after* an evaluation became a matter of record, but which occurred *during* the period of that evaluation, could be mentioned in the ratee's *next* evaluation because the incident was not previously reported. In rare cases, serious offenses (such as those punishable by courts-martial) may not come to light or be substantiated for several years. In those cases, inclusion of that information may be appropriate even though the incident/behavior occurred prior to the last reporting period. Additionally, negative incidents from previous reporting periods involving the character, conduct, or integrity of the ratee that continue to influence the performance or utilization of the ratee may be commented upon *in that context only*. Commanders and SRs make the determination of what constitutes a significant addition. If a commander has considered and decided not to comment on a known adverse action, an incumbent commander may not overturn a previous commander's decision by requesting the adverse action be added after the evaluation has been made a matter of record, nor may the incumbent commander include it in the next evaluation. However, if the behavior has continued into the next rating period, an evaluator may comment on the specific behavior for that rating period.

1.12.4. Derogatory Information and Disciplinary Actions. 1.12.4.1.4. When it is determined that such conduct is appropriate for comment, refer to the underlying performance, behavior or misconduct itself and not merely to the fact that the conduct may have resulted in a punitive or administrative action taken against the member, such as a letter of reprimand, Article 15, courts-martial conviction, etc. **EXAMPLE:** An evaluator should say: "SSgt Johnson engaged in drunk and disorderly conduct and drove while intoxicated," rather than "SSgt Johnson got an Article 15 for violations of Article 92 and 134."

1.12.4.4. Disciplinary Actions. 1.12.4.4.1. Must be reasonably specific, clearly outlining the event and/or behavior. Comments such as "conduct unbecoming" or "an error in judgment led to an off-duty incident" are too vague and open the door for appeals. Also see paragraph 1.10.2.1. on vague comments. 1.12.4.4.2. The ratee must be advised specifically why he or she is considered substandard to respond appropriately. 1.12.4.4.3. An evaluation should not simply contain the comment that "MSgt Smith received an Article 15 during this period." Instead, the underlying conduct should be specifically cited with the resulting action included, such as: "During this reporting period, Lieutenant Jones sexually harassed a female subordinate for which he received an Article 15," or "MSgt Jones drove while under the influence, for which he received an Article 15." 1.12.4.4.4. In any case, the focus of the comment should be on the conduct or behavior. Evaluators should consult the servicing SJA or local personnel advisors for questions regarding the appropriateness of including comments about misconduct and/or the resulting actions on a performance evaluation.

AIR FORCE EVALUATION

AFPC/DP3SP recommends denying the applicant's request for removal of the OPR covering the rating period of 1 Sep 2017 to 21 May 2018 and correction to his 2019 OPR. According to AFI

36-2406, the purpose of the Air Force evaluation system is to establish performance standards and expectations for ratees, provide meaningful feedback on how well the ratee is meeting those expectations, and direction on how to better meet those established standards and expectations. Secondly, it provides a reliable, long-term, cumulative record of performance and promotion potential based on that performance. Lastly, it provides officer Central Selection Boards (CSBs), senior non-commissioned officers (SNCOS) evaluation boards, and other personnel managers with sound information to assist in identifying the best qualified officers and enlisted personnel for promotion, as well as other personnel management decisions.

Moreover, in accordance with AFI 36-2406, when considering the Airman's ability to meet standards, consider unacceptable performance as actions that are incompatible with, and/or Airman who *routinely* (a repeated inability to meet standards that would render the aggregated performance assessment over the entire reporting period as below Air Force standards and expectations) and/or *significantly* (a single instance where failure to meet standards is either egregious in nature or so far short of a standard that it impacts overall aggregated performance assessment) failed to adhere to established Air Force standards and expectations. This includes, but is not limited to, comments regarding omissions or misrepresentations of facts in official statements or documents, financial irresponsibility, mismanagement of personal or government affairs, confirmed incidents of discrimination or mistreatment, illegal usage or possession of drugs, absent without leave (AWOL), Article 15 action, and conviction by courts-martial.

The applicant was issued a Letter of Reprimand (LOR) and an Unfavorable Information File (UIF) due to a substantiated Command Directed Investigation (CDI) for repeatedly making unprofessional statements to subordinate flight members, including sexual innuendos and inappropriate comments regarding individuals' physical appearance. As a result, his rater documented these as failures to meet expectations, as required by AFI 36-2406, on his 21 May 18 OPR.

The applicant contends that the 21 May 18 OPR is unjust as his referral response that he provided to both his rater and additional rater are not part of the OPR in the official record. Additionally, he contends that the language on his 30 Apr 19 OPR, "Work-Pr... rebounded sufficiently", refers to alleged misconduct outside of that rating period and does not meet an exception to allow language referring to a time frame outside the rating period. It is noted that while it appears the applicant may have disagreed with the rater on portions, he provided a rebuttal which stated, "I accepted responsibility as well."

Based on the documentation provided by the applicant and analysis of the facts, there is insufficient evidence of an error or injustice. The 21 May 18 OPR, as well as the 30 Apr 19 OPR, was completed according to regulations/instructions at the time. However, the applicant does have an administrative avenue to submit rebuttal documents for inclusion into the official record for the 21 May 18 OPR, as required by AFI 26-2406.

The complete advisory opinion is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 17 Aug 22 for comment (Exhibit D), and the applicant replied on 9 Sep 22. In his response, the applicant contends that his acceptance of responsibility is not the same as an admission of guilt. While admitting to making some mistakes, flatly denying others, and accepting the results that came from those mistakes, to conflate "I accepted responsibility as well" regarding all allegations as having been committed is false and one in which he has consistently disagreed.

Despite every reasonable attempt, to include a FOIA request, he has failed to receive a copy of the command directed investigation (CDI) report and so he only has a vague sense of what it alleges. However, both the ADC who advised him during the proceedings of the referral OPR and the LOR, and the Deputy Wing IG have indicated that none of the interviewees believed he was making any advances or other sexual overtures towards any individual. In reflection, while his comments were not appropriate, and he later learned how they make others feel uncomfortable, none were as egregious as might be indicated by the severity of the language in the referral OPR. A review of the CDI report would corroborate this assertion, but the report is not available.

Evidence of the actual wrongdoing vice what is implied could be found in the report. However, absence of the CDI report denies his ability to make his arguments to the Board, or any future deciding body or supervisors. He cannot make his case to any decision-making authority on the severity of what he did or did not do, and they must then arrive at their own conclusions based on the language in the referral OPR and my word. Additionally, without the content of the CDI report, the substantiation of the “accused of unprofessional/inappropriate conduct” cannot be established. The Deputy Wing IG read the report and wrote a letter stating that based on his extensive experience in the Air Force, clearly the commander acted at the furthest end of his authority, which was beyond reasonable.

Given the new law, the LOR will continue to stand on its own and removing the referral OPR will not “erase” the record of mistakes on his part. The LOR and his response, provide more detail and context for future discussions with any supervisory, board, or other decision-making authority. Doubling down on the language of the referral OPR has the deliberate effect of giving the LOR longevity past its natural expiration date and therefore stands as a punishment to last his entire career.

This referral OPR and its prejudicial language not only prevents any competitiveness, which the LOR mitigates, but directly and knowingly affects determination of fitness to continue serving honorably in terms of offered continuation and achieving retirement eligibility. His subsequent record proves his willingness and ability to rehabilitate personally; the referral OPR reasonably prevents the ability to rehabilitate professionally.

If a performance report is meant to provide feedback on performance, then it is a rehabilitative process in the case of referrals. The language used by the commander is inappropriate. Writing a report in which any reasonable observer would associate performance/behavior as criminal, when it was clearly not, and the only evidence is a missing CDI report, makes this unjust and an error. Removing the referral OPR will right this injustice.

The applicant’s complete response is at Exhibit E.

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, to include the applicant’s rebuttal, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendations of AFPC/DP3SP and finds a preponderance of the evidence does not substantiate the applicant’s contentions. The applicant contends his referral OPR was the result

of a flawed CDI report, and it is not available to him; however, evidence shows there were substantiated allegations of the applicant's unprofessional and inappropriate conduct validated through the CDI as depicted on his 2018 referral OPR. According to ARMS, the applicant's response to his referral OPR was considered by his commander and was made a part of his official record. Also, while the applicant further contends the comments annotated on his report to be "unfair and unnecessarily inflammatory," the Board determined the comments meet the criteria of AFI 36-2406, as they are reasonable specific, and clearly outline the event and/or behavior of the applicant, to include the resulting action. Further, while the applicant contends there is no evidence of his wrongdoing, he acknowledged that he made inappropriate comments, and his actions made some individuals uncomfortable. The Board finds this type of behavior violates Air Force standards and professionalism expected of an Air Force commissioned officer. Moreover, the Board determined the applicant's contested comment in his subsequent OPR does not violate the intent of AFI 36-2406. The comment stating the applicant rebounded sufficiently has no negative connotations. The Board finds that neither his rater, or additional raters, comments were either arbitrary or capricious and fall within the bounds of their authority. 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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2021-03875 in Executive Session on 16 Sep 22:

- , Panel Chair
- , Panel Member
- , Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 24 Nov 21.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DP3SP, dated 16 Aug 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 17 Aug 22.
- Exhibit E: Applicant's Response, dated 9 Sep 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