

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-00009

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. Her Article 15 be removed from her record and be set aside.
2. Her referral officer performance report (OPR) for the period ending 25 May 12 be removed from her record.

APPLICANT'S CONTENTIONS

On 10 Nov 11, her wing commander (WG/CC) issued her nonjudicial punishment (NJP) based on allegations of an unprofessional relationship. She was accused of having an unprofessional relationship with two noncommissioned officers (NCOs) in her squadron. The allegations were based on office communicator messages. At the time, she was a young officer and was learning to be a leader. While the language she used could be seen as inappropriate, she did not have an unprofessional relationship with the two NCOs. The Article 15 for the allegations was excessive. The evidence supporting the allegations was clouded with bias and was erroneous.

In 2014, after she was passed over for promotion to the grade of captain (O-3), her WG/CC requested removal of the Article 15 from her officer selection record (OSR). She provides many of the supporting letters from the original action. The WG/CC who issued the Article 15 and is now retired recommended the NJP be set aside. Two general officers and her current WG/CC also recommended removal of the Article 15.

In 2019, her request for removal of the Article 15 was denied because of an entry in the Air Force Automated Military Justice Analysis and Management System (AMJAMS) contained negative information about her that was false and was not the basis for the Article 15. The AMJAMS statement was supposedly made from the staff sergeant's (E-5) now deceased wife who was undergoing a divorce and placed the blame on her. The allegations were unable to be confirmed as she was killed by her spouse. She was never provided an opportunity to respond to the negative information and her due process rights were violated. Despite multiple attempts, she has not been able to recover the physical evidence. In 2021, she attempted to try and get the AMJAMS input removed; however, learned that this was not possible.

Per AFI 36-2909, *Air Force Professional Relationships and Conduct*, an unprofessional relationship is defined as one that degrades morale, good order, and discipline or unit cohesion. She never intended to cross any boundaries, never spent off-duty time with them and was never made aware her actions gave the appearance of an unprofessional relationship until she was offered NJP. It was mentioned to her, she could have taken measures to ensure there was no appearance of favoritism or any other unprofessional relationship. Any perceptions could have been ceased with a verbal counseling.

AFI 51-202, *Nonjudicial Punishment*, only allows set aside if there are unusual circumstances. In her case, setting aside the Article 15 is in the best interest of the Air Force. Further evidence is the staff sergeant she was accused of having an unprofessional relationship with killed his wife in 2014. She had stated in her rebuttal to the Article 15, she was concerned about his well-being and his relationship with his wife. As a result of her concern, she began communicating with his supervisor, a technical sergeant (E-6), she was alleged to have had an unprofessional relationship with. She did her best to provide mentorship and support and it was this communication that was allegedly unprofessional. She understands the importance of remaining professional; however, she believed it was necessary to approach the NCO personally and is saddened neither she nor the Air Force was able to assist him in his struggles.

Due to the Article 15, she received a referral OPR and was passed over for captain on her first board and is now behind her peers. Despite her record and accolades, her chances of continued service are slim. The recent Department of the Air Force Policy Memorandum (DAFPM) on Adverse Actions states that all adverse information will be permanently placed in the master personnel records group; except for set aside of court-martial or NJP action and removal of adverse information may only be directed by the AFBCMR. If unchanged, her record will not be competitive. She will be denied career broadening opportunities and prevented from continuing to serve in the Air Force.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

AF Form 3070C, *Record of Nonjudicial Punishment Proceedings (Officer)*, dated 27 Oct 11, shows the applicant received an Article 15. It states from 1 Mar 11 to 31 Aug 11, the applicant was derelict in the performance of her duties by failing to maintain a professional relationship with the named staff sergeant (E-5) and the named technical sergeant (E-6) as it was her duty to do. Punishment included a reprimand and forfeiture of \$456.00 pay. In her response dated 9 Nov 11, the applicant requested that the NJP be found inappropriate for the offenses and be dismissed. She stated she realized she crossed the line while looking out for the welfare of her troops. It was a deviation from her usual conduct and that it would not happen again. She asked that a lesser form of punishment, such as a letter of counseling (LOC) or letter of reprimand (LOR) be considered. The Article 15 was filed in the applicant's officer selection record (OSR).

AF Form 707, *Officer Performance Report (Lt thru Col)*, for the reporting period ending 25 May 12 shows she received a referral OPR. The applicant was marked as "Does Not Meet Standards" in Professional Qualities and Judgment and Decisions. Block IV, *Rater Overall Assessment*, states the applicant failed to maintain a professional relationship with two NCOs via instant messenger; and she received an Article 15. Block XI, *Referral Report*, states the report was referred for dereliction of duty when she failed to maintain a professional relationship with two of her NCOs. In her rebuttal comments dated 6 Jun 12, the applicant stated part of the evidence she was provided with included instant messenger chats. She had been exposed to the language for most of her life and it came across as normal. The two NCOs were her key teachers and mentors in helping her learn to do her job. She attended social gatherings with her enlisted personnel for encouragement and motivation to show she cared. She stayed as long as it was polite and then promptly left. For the past year, it was the two NCOs who took her under their wings and guided her to do her job properly. She should have briefed the first sergeant and/or her supervisor on the staff sergeant's personal problems. She was trying to be a good officer and supervisor and was trying to look out for their welfare.

In a memorandum dated 5 Feb 13, the applicant requested the NJP be removed from her OSR in accordance with AFI 36-2608, *Military Records System*, which allowed lieutenant colonels (O-5) and below to request removal of the NJP after the officer is afforded one in the promotion zone (IPZ) or above the promotion zone (APZ) consideration. The applicant met the P0312C Captain board and was not selected. The applicant accepted full responsibility for her lapse in judgment. On 13 Feb 13, her WG/CC concurred with the applicant's request and on 25 Feb 13, the Numbered Air Force commander (NAF/CC) approved the removal of the Article 15 from her OSR.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisory at Exhibit C.

APPLICABLE AUTHORITY/GUIDANCE

DoDI 1320.14, *DoD Commissioned Officer Promotion Program Procedures*, Section 3: Procedures, para c(5), Adverse information will be presented to promotion selection, special selection and federal recognition boards that consider officers for promotion to the grades of regular major through colonel. Adverse information that is part of the officer's official military personnel record will be provided to the board.

AFI 36-2608, *Military Personnel Records System*, paragraph 8.3.15, effective 1 Mar 21, per DAPFM 2021-36-03, adverse information will be permanently placed in the master personnel records group, except for the set aside of a court-martial or nonjudicial punishment action. Removal of adverse information from the master personnel record group may only be directed pursuant to an AFBCMR recommendation.

AFI 36-2603, *Air Force Board of Corrections to Military Record*, paragraph 2.3, 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.

AIR FORCE EVALUATION

DAF/JA recommends denial. There is no injustice in the NJP, in its maintenance in her record, or in the AMJAMS record. Further, the tragic murder does not mitigate the applicant's offenses, but rather aggravates them. Finally, the new law requiring transparency is not unjust, but rather more applicable.

On 10 Nov 11, her WG/CC administered Article 15 proceedings. It was determined from Mar 11 to Aug 11, the applicant failed to maintain a professional relationship with the two named noncommissioned officers (NCOs), in violation of Article 92, Uniform Code of Military Justice (UCMJ) and ordered the NJP to be filed in the applicant's OSR. The evidence considered included a commander directed investigation (CDI). Although the evidentiary record is no longer available (may have been destroyed or lost), the record shows there were allegations the applicant socialized at bars with the two named subordinates on several occasions, there was an allegation of the applicant dancing on a table while inebriated in the presence of the two named subordinates and an allegation of inappropriate text messages exchanged, including sexually explicit messages by the named staff sergeant to the applicant. DAF/JA does not have evidence of which allegations were substantiated.

The applicant implies her own misconduct was only for the text messages. She does not mention the sexual nature of messages from the staff sergeant, which were confirmed. She also does not mention her misconduct with the technical sergeant. Despite the now unavailable evidence, the principal of presumption of regularity and presumption the NJP authority found sufficient grave misconduct to administer the action applies. Prior to the NJP, the applicant consulted with an

attorney and declined to demand trial by court-martial as was her right, and accepted the NJP. Afterwards, she declined to appeal the NJP.

On 2 Nov 11, the staff sergeant also received NJP for maintaining the same unprofessional relationship with the applicant, plus two other lower ranking enlisted. Two years later, on or about 16 Jan 14, he murdered his wife and claimed it was accidental. He was prosecuted by a civilian court, pled guilty and sentenced to 25 years confinement.

The applicant made several requests to have her NJP removed from her OSR or that it be set aside. In Feb 13, the applicant requested the NJP be removed from her OSR. Contrary, to present assertions, she stated she accepted full responsibility for her lapse in judgment. At the time she was a first lieutenant (O-2) and had failed selection for captain. As a result, on 25 Feb 14, the NAF/CC granted her request and removed the NJP. On at least three occasions afterwards, the applicant requested a set-aside of her NJP and the requests were denied.

The ability for officers to have their adverse information removed from their records and not viewed by promotion selection boards was changed in 2020. This even applies to adverse history that has already been removed from an OSR by their commander. Congress, through the National Defense Authorization Act (NDAA) for fiscal year 2020, required the military to furnish adverse information to selection boards considering active duty officers for promotion to O-4 and above. On 16 Dec 20, DoDI 1320.14, was issued to implement the congressionally mandated change. On 26 Feb 21, the Secretary of the Air Force (SecAF) ordered a policy change via DAFPM 2021-36-03, *Adverse Information for Total Force Officer Selection Boards*, to comply with the NDAA and DoDI. The DAFPM is clear that waivers to this policy are not permitted and NJPs, among other adverse information will be permanently placed in master personnel records group, and that except for the set aside of a court-martial or an NJP action, removal of adverse information may only be directed pursuant to an AFBCMR recommendation. This is not a new or different type of review for the AFBCMR. Rather, it falls under the Board's existing review authority for corrections resulting from an error or injustice.

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 8 Jul 22 for comment (Exhibit D), and the applicant replied on 24 Jul 22. In her response, the applicant questioned whether it was a one mistake Air Force and whether one potential mistake should have career ending implications. The advisory stated the NJP authority considered a completed commander-directed investigation (CDI). She was never made aware of the allegations that were made in the CDI. The only evidence she and her area defense counsel (ADC) were provided were the instant messenger messages. The ADC, who she never met in person, advised she should accept the Article 15. She did not know what the process was or what her rights were. The communicator messages alone were excessive for NJP, especially without any progressive discipline occurring in the process. She did take responsibility for the instant messages. Her conversations were to help the two NCOs and assist airmen in need. While she may not have gone about it the right way, her intentions were pure. None of the things in the CDI ever occurred. The allegations against her were untrue and she was not made aware or given the chance to defend herself against the allegations. There were no text messages as she was in Germany and had to buy an international phone that did not have text capability. Her understanding is only the evidence attached to the NJP can be used against her. If the CDI was conducted and was used as evidence, it was never presented to her.

She has proven she did not have this information that legal had through her personal response and through the letters of support. Her referral OPR also clearly states the relationship was only based

on instant messenger chats. Two lawyers responded that it should not have been classified as an unprofessional relationship.

As to the second question whether one potential mistake should have career implications. She has used her lessons learned to teach subordinate officers and mentors over 50 females in her career field. Her former and current commanders continually pushed for the NJP to be set aside.

She feels severely discriminated against based on the allegations indicated in the CDI and the career impact of being a female in a male dominated career field. If the roles were reversed, they would have been rewarded for taking care of their troops. There would also not have been made up allegations from a vindictive spouse who was trying to get more custody support and place blame on a superior officer by making up lies. Further, she was on temporary duty (TDY) most of the time and was too busy to be hanging out with enlisted personnel and doing what the allegations claim.

If she had been given the transparency required, the outcome may have been different. She was not given the full CDI to properly defend herself. As a result, her due process rights were violated. Her rights continue to be violated as the CDI report continues to be used to deny her request for the NJP to be set aside. She was also severely discriminated against because she is a female officer and the suggestions of a sexual relationship and affair are false. She requests the NJP be set aside.

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, the Board concludes the applicant is the victim of an error or injustice. While the Board notes the recommendation of DAF/JA against correcting the record, the Board finds a preponderance of the evidence substantiates the applicant's contentions. While there appears to have been a commander-directed investigation (CDI), for unknown reasons, the results of the CDI are no longer available. The applicant contends the results of the CDI were not made available to her and that the allegations did not occur. Accordingly, the Board cannot know what the allegations were or what allegations were substantiated; however, the applicant's nonjudicial punishment (NJP) and referral officer performance report (OPR) indicate the applicant's misconduct was an unprofessional relationship for the inappropriate instant messenger communications. In this respect, the Board finds the NJP and referral OPR for the instant messenger communications were excessive and disproportionate. The Board also finds the instant messenger exchanges did not constitute an unprofessional relationship and there is no evidence the communication negatively impacted good order and discipline. Moreover, the Board notes the applicant's WG/CC on 13 Feb 13 and her NAF/CC on 25 Feb 13 recommended the Article 15 be removed from her officer selection record (OSR). Therefore, in the interest of justice, 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. Her AF Form 3070C, *Record of Nonjudicial Punishment Proceedings (Officer)*, dated 27 Oct 11 be set-aside and removed from her records.
- b. AF Form 707, *Officer Performance Report (Lt thru Col)* for the reporting period of 4 Jun 11 thru 25 May 12 be void and removed from her 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.”

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-2022-00009 in Executive Session on 21 Sep 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 19 Dec 21.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, DAF/JA, dated 30 Jun 22.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 8 Jul 22.
Exhibit E: Applicant’s Response, 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.