

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-00866

XXXXXXXXXXXXXXXXXXXX

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 date of rank (DOR) for colonel (O-6) be adjusted back to his original date of 1 Jul 18.
2. The FBI indexing/arrest records be expunged.

APPLICANT'S CONTENTIONS

His promotion to the rank of colonel was delayed due to an accusation of sexual assault after serving a disciplinary action to a subordinate officer. The investigation revealed the accusation was fraudulent and all charges were dismissed. After a review of the evidence, his senior rater recommended to the Secretary of the Air Force (SecAF) he be reinstated to colonel with his original DOR. The SecAF approved the reinstatement; however, his DOR was arbitrarily adjusted to 2 Jan 20 without cause. AF/JA and SAF/GC reviewed the reinstatement and determined it was legally sufficient with no comments.

At the same time his promotion reinstatement was being routed, he filed an inspector general (IG) complaint identifying gross misconduct by the Air Force Judge Advocate General (AF/JAG) for not disclosing critical exculpatory evidence in his case. Of great concern was that AF/JA assigned an investigating officer (IO) from within AF/JA and then closed his IG complaint as unfounded. His DOR adjustment was a verbal reprisal recommendation from AF/JA to the SecAF due to his IG complaint highlighting the JAG prosecutorial misconduct. To compound matters, the local JAG did not recommend expungement of his indexing/arrest records. His command reviewed the entire case and went against the JAG, recommending the indexing/arrest records be expunged. AF/JAG disapproved the expungement without cause and reprised against him.

The AF Form 4364, *Record of Promotion Delay Resolution*, states that if the officer did not meet standards for promotion during the delay period, the SecAF (or designee) may adjust the officer's DOR to reflect the date the officer met standards. He met and exceeded standards during the entire period. All charges were withdrawn and dismissed. He never received any nonjudicial punishment (NJP). There was no unfavorable information file (UIF), or any derogatory information filed in his records. His command's unbiased recommendation to expunge his indexing/arrest records should be upheld. He asks he be made whole so he may transition to civilian status without a lifetime of prejudice due to the fraudulently based FBI indexing/arrest records. AFI 36-2907, *Adverse Administrative Actions*, paragraph 5.1 and AFI 90-301, *Inspector General Complaints Resolution*, states a commander or supervisor must take appropriate action if it is reasonable to believe retaliation occurred.

His delay in his promotion and creation of the National Crime Information Center (NCIC) criminal history date and fingerprints being indexed are the result of false allegations of sexual harassment

that morphed into a false allegation of sexual assault. A complaining witness, with a history of using false allegations to escape the consequences of her own misconduct, made false allegations against him. He was fully exonerated of the allegations and the false allegations were dismissed. His senior rater, AF/JA, SAF/GC and the SecAF ultimately determined he was innocent and worthy of being promoted to the rank of colonel. The government did not have reasonably trustworthy information to conclude there was probable cause or that any criminal actions were committed. The complainant's decision to no longer participate was made after the third day of the court martial and after it was discovered she previously made two false allegations of military sexual assault which were deemed unfounded by law enforcement. The complainant received an Army general officer memorandum of reprimand as a result of her misconduct for another false claim of sexual assault. The complainant also told investigators she provided the Office of Special Investigations (OSI) with an item that would include his DNA. However, testing showed beyond a shadow of a doubt that it did not. Instead, it had semen from a different unidentified male. She also provided investigators with unwashed items she said had blood on them; however, they did not. The evidence showed the complainant was not credible and did not provide any reasonably trustworthy information. The complainant has been shown to habitually lie and weaponize a sexual assault system to avoid the consequences of her own misconduct.

The process he went through of having his fingerprints indexed and the implications of the indexing are very serious. Without action of the expungement, the effects of the indexing will be lifelong. All federal and cooperating state law enforcement agencies use the NCIC system. In his case, his background will show he was arrested for sexual assault every time he should apply for a job or to have his security clearance reviewed or renewed. It will be assumed he did something wrong.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a colonel (O-6) in the Regular Air Force.

AFOSI provides the Summary of Investigation, Report of Investigation (ROI) dated 4 Dec 18, which states the applicant was referred for investigation for the offense of rape. The AFOSI investigation was initiated on 12 Dec 17 based on information received from the IO in a commander directed investigation (CDI) involving the applicant and victim. The victim reported the applicant sexually harassed her and abused his authority by serving her with a letter of admonishment (LOA) without just cause. After leaving the deployed location, the victim contacted the sergeant major (E-9) and stated the applicant raped her. The sergeant major noted the victim experienced issues with alcohol. Forensic analysis obtained identified semen on the towel provided by the victim. A DNA mixture from the towel was interpreted as originating from an unknown male. The applicant was excluded. Blood was not identified on any of the items provided by the victim.

The Entry of Judgment in the Case of *United States v Applicant* dated 20 Nov 19 shows a general court martial on 20 Nov 19 acquitted the applicant of the following:

Charge I, Article 92, Specification: On or about 18 Oct 17 and 21 Oct 17, the applicant violated a lawful general regulation, AFI 90-301, *Inspector General Complaints Resolution*, by wrongfully reprisng against [redacted]. Plea: None entered. Findings: Withdrawn and dismissed without prejudice.

Charge II, Article 93, Specification: On or about 29 Jul 17 and 21 Oct 17, the applicant maltreated [redacted], a person subject to his orders by sexually harassing her. Plea: None entered, Findings: Withdrawn and dismissed without prejudice.

Charge III, Article 120, Specification 1: Between 1 Aug 17 and 31 Aug 17, the applicant committed sexual contact upon [redacted]. He caused her hand to touch his penis with an intent to gratify his sexual desire by causing bodily harm to her, without her consent. Plea: None entered, Findings: Withdrawn and dismissed without prejudice. Specification 2: On or about 1 Aug 17 and 31 Oct 17, the applicant committed sexual contact upon [redacted], touching her breast with his hand, with an intent to gratify his sexual desire by causing bodily harm to her, without consent. Plea: None Entered. Findings: Withdrawn and dismissed without prejudice. Specification 3: On or about 1 Aug 17 and 31 Aug 17, the applicant committed a sexual act upon [redacted], penetrating her anus with his penis, by causing her bodily harm, without her consent. Plea: None entered. Findings: Withdrawn and dismissed without prejudice.

Charge IV, Article 133, Specification: Between 29 Jul 17 and 21 Oct 17, make comments of a sexual nature in the presence of enlisted personnel, constituting conduct unbecoming an officer and a gentleman. Plea: None entered. Findings: Withdrawn and dismissed without prejudice.

Per the Entry of Judgment, criminal indexing was required for fingerprint card and final disposition in accordance with DODI 5505.11, *Fingerprint Reporting Requirements*.

AF Form 4364, *Record of Promotion Delay Resolution*, dated 27 Mar 20 shows his senior rater on 27 Mar 20 notified the applicant of his intent to recommend his name be removed from the promotion list. It states his original projected promotion date was 1 Jul 18 and the promotion was previously delayed until 1 Jan 20. A female Army captain (O-2) alleged the applicant sexually harassed and sexually assaulted her while they were deployed in 2017. An AFOSI investigation into the sexual assault allegation revealed the applicant engaged in misconduct while deployed in 2017. The charges and specifications were preferred and referred to trial by the numbered air force commander (NAF/CC). However, the charges and specifications were dismissed three days into trial after the complainant who was eight months pregnant decided to no longer cooperate or testify. Since then, his director served him with a letter of admonishment (LOA) for some of the misconduct uncovered during the investigation. After review of his response, his director withdrew the LOA and verbally counseled him. The allegations, verified by other sources other than the complainant, include the applicant made inappropriate comments of a sexual nature while deployed to lower ranking military personnel, sent text messages of an unprofessional nature to a subordinate female, which culminated in him answering the door to her in his underwear and following his issuance of a no drinking order to the female, he taunted her with providing her a drink in exchange for her actions. On 22 Jun 20, his senior rater recommended the termination of the promotion delay and that his original date of promotion be reinstated. AF/JA and SAF/GCI noted the recommendation was legally sufficient. On 19 Jan 21, the SecAF approved the delay termination; however, noted an effective DOR and effective date adjustment of 2 Jan 20 rather than the original date of promotion.

Special Order dated 22 Jan 21, shows by verbal order of the SecAF on 22 Jan 21, the applicant was promoted to the rank of colonel with DOR and effective date of 2 Jan 20.

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

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.

AFI 90-301, paragraph 1.43.1. All Commanders possess an inherent authority to investigate matters or incidents under their jurisdiction, unless preempted by a higher authority. The primary

purpose of a CDI is to gather, analyze and record relevant information about matters of primary interest to command authorities.

DAFI 36-2501, *Officer Promotions and Selective Continuation* 5.4. Delaying a Promotion. Delaying an officer's promotion is applicable to officers eligible for promotion to first lieutenant and captain or selected for promotion by a Central Selection Board or SSB to the grades of captain through colonel. A commander takes action to delay a promotion if there is cause to believe that the officer has not met the requirement for exemplary conduct set forth in Title 10, U.S.C. 8583 or is not mentally, physically, morally, or professionally qualified to perform the duties of the higher grade. Promotions can also be delayed if: (1) sworn charges against an officer have been received by an officer exercising general court-martial jurisdiction over the officer and such charges have not been disposed of; (2) an investigation is being conducted to determine whether disciplinary action of any kind should be brought against an officer; (3) a board of officers has been convened under Title 10, U.S.C., Chapter 60, to review the record of an officer; (4) a criminal proceeding in a Federal or State court is pending against the officer; or (5) substantiated adverse information about the officer that is material to the decision to appoint the officer is under review by the Secretary of Defense or the Secretary of the Air Force. A commander takes action to delay the promotion until it is determined whether an officer should be promoted. The delay of promotion is effective when the commander notifies the officer of the delay, either verbally or in writing. Accomplish this notification prior to the effective date of the promotion.

DAFI 36-2501, paragraph 5.4.3.1, Only the SecAF (or designee) may end a promotion delay. Notwithstanding a commander's recommendation, SecAF (or designee) may promote an officer on his or her original effective date; promote an officer with a DOR adjustment; extend the promotion delay; or remove the officer from the promotion list. The SecAF determined the applicant's DOR to be 2 Jan 20.

DODI 5505.11, *Fingerprint Reporting Requirements*, paragraph 1.2, DOD law enforcement agencies (LEA) will collect fingerprints and criminal history record information (CHRI) for service members investigated for all offenses punishable by imprisonment listed in the punitive articles of the UCMJ or elsewhere in the U.S.C. Paragraph 2.2.c(1). Commanders and directors or DOD LEA to provide disposition for cases investigated by a Defense Criminal Investigative Organization (DCIO) or other DOD LEA, to include any administrative, nonjudicial punishment or judicial action taken as a result of an investigation, to include a decision to take no action.

DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, Paragraph 2.4. 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.

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 not the victim of an error or injustice. The Board finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant contends his performance was exemplary, AF/JA conducted misconduct in the court martial proceedings and he was reprimed against by AF/JA in the delay of his promotion to the rank of colonel; however, the Board finds he has provided insufficient evidence to substantiate his allegations. The Board notes the court martial charges were dismissed and his commander recommended his promotion to the rank of colonel with original DOR and effective date be reinstated. However, the ROI and the applicant's PPA dated 27 Mar 20 shows

the investigation into the allegations of sexual harassment and sexual assault revealed other misconduct by the applicant, which were verified from other sources than the alleged victim. In this respect, the Board finds the SecAF concluded the applicant did not meet standards for part of the delay period and approved an adjustment of his DOR and effective, which was within the SecAF's authority and discretion in accordance with DAFI 36-2501. With respect to the allegations of reprisal, the Board is not an investigative body; however, conducted an independent review of the complete case and finds the applicant has failed to sustain his burden of proof he was the victim of reprisal under 10 U.S.C. § 1034. In view of the above, the Board finds no reason to recommend AFOSI change the FBI indexing verbiage, which is required per DODI 5505.11 even when there is a decision to take no action. 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-2022-00866 in Executive Session on 21 Dec 22 and 11 Jul 23:

, 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 17 Mar 22.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: AFOSI ROI, w/atchs, dated 4 Dec 19 (WITHDRAWN).

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.

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Board Operations Manager, AFBCMR