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RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-01124

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His 1 Jul 19 thru 30 Jun 20, referral Officer Performance Report (OPR) be removed from his Military Personnel Record (MPR).
2. His 2019-2020 referral OPR be declared null, void, and unusable in any officer selection record.
3. His Unfavorable Information File (UIF) be dismissed and expunged from his record.

APPLICANT'S CONTENTIONS

In a 12-page legal brief, the applicant through his counsel contends in complete disregard of the facts and Air Force Instructions (AFIs), his direct rating superiors arbitrarily chose to classify otherwise benign comments and perfectly proper intentions as adverse and unprofessional as well as violative of the Air Force Equal Opportunity (EO) policy and took inappropriate adverse actions against him in the form of issuing a Letter of Reprimand (LOR) that resulted in a referral OPR. He seeks removal of these items due to their damaging effects on his prospects for a military career with the Air Force Reserve/National Guard or other branches of the military.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force captain (O-3).

In Nov 18, according to documentation submitted by the applicant, he was inaccurately deemed to have made racist remarks in violation of Air Force EO policy as well as the decorum demanded of its officers.

On 4 Jun 20, according to documentation submitted by the applicant, he was issued a LOR, for being inaccurately deemed of making sexist remarks in May 20, in violation of Air Force EO policy as well as the decorum demanded of its officers.

On 10 Aug 20, the applicant's flight commander (rater) initiated a referral OPR for the period 1 Jul 19 thru 30 Jun 20. The OPR was referred as defined in DAFI 36-2406, *Officer and Enlisted Evaluations Systems*, para 1.10. Specifically, the applicant made inappropriate comments on a public Facebook forum and to other squadron members which violated Air Force EO policies as described by DAFI 36-2710, *Equal Opportunity Program* (replaced AFI 36-2706) which caused harm to the organizational climate of the unit, and for which he received a LOR.

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On 18 Aug 20, the applicant's squadron commander (additional rater), after considering the applicant's comments to the referral OPR, concurred with the flight commander's assessment, signing the referral OPR.

On 30 Jun 21, the applicant was honorably discharged, having four years of active service.

On 9 Aug 21, according to documentation submitted by the applicant, the base EO Director issued a Memorandum for Record that during the period 2017 through 2021, the applicant was never the subject of any EO incidents or investigations, nor were any informal or formal complaints filed against him.

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

APPLICABLE AUTHORITY/GUIDANCE

DAFI 36-2406, paragraph 1.8.3. Equal Opportunity and Treatment: Unlawful discrimination and sexual harassment violate the very premise of what it means to be an Airman. Evaluators must ensure compliance with DoD and Department of the Air Force directives prohibiting such behavior and document deviations on evaluations as prescribed in AFI 36-2710, *Equal Opportunity Program*. (T-0)

DAFI 36-2406, paragraph 1.12.3.4. Prior Events: Events that occurred in a previous reporting period that add significantly to the evaluation, were not known to and considered by the previous evaluators and were not already reflected in a previous evaluation in the permanent record (this includes EPRs, OPRs, LOEs, and TRs) can be included in a subsequent evaluation.

DAFI 36-2710, Definitions:

Discrimination (Military)—Any unlawful action that denies equal opportunity to persons or groups based on their race, color, sex, national origin, religion, or sexual orientation.

Sexual Harassment—For the purposes of this instruction, sexual harassment is defined pursuant to DoDI 1020.03. Sexual Harassment involves unwelcome sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature when: (1) Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; (2) Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or (3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive environment; and is so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the environment as hostile or offensive. Use or condonation, by any person in a supervisory or command position, of any form of sexual behavior to control, influence, or affect the career, pay, or job of a member of the Armed Forces is prohibited. Any deliberate or repeated unwelcome verbal comments or gestures of a sexual nature by any member of the Armed Forces or civilian employee of the Department of Defense is prohibited. There is no requirement for concrete psychological harm to the complainant for behavior to constitute sexual harassment. Behavior is sufficient to constitute sexual harassment if it is so severe or pervasive that a reasonable person would perceive, and the complainant does perceive, the environment as hostile or offensive. Sexual harassment can occur through electronic communications, including social media, other forms of communication, and in person.

AIR FORCE EVALUATION

AFPC/DP2SSM recommends denying the applicant's request to dismiss and expunge his UIF from his MPR. Based on the supporting documentation (rebuttal to the UIF) provided by the applicant, he received a LOR and UIF which he contends was factually inaccurate. The LOR and UIF are not currently maintained in the applicant's personnel record, therefore, they cannot provide an input on that matter, only that they opine the adverse information met AFI requirements. In accordance with (IAW) DAFI 36-2907, *Adverse Administrative Actions*:

2.2. Standard of Proof. The Standard of Proof for adverse administrative actions is the "preponderance of the evidence." This standard will be used when evaluating the evidence and every element of the alleged offenses. (T-1).

2.2.1. A preponderance of the evidence exists when it is more likely than not that events have occurred as alleged. Preponderance of the evidence is not determined by the number of witnesses or exhibits, but by all the evidence and evaluating factors such as a witness' behavior, opportunity for knowledge, information possessed, ability to recall, as well as related events and relationship to the matter being considered.

2.3.5. Letter of Reprimand (LOR). Administrative censure for violation of standards which is more severe than a RIC, LOC, and LOA and indicates a stronger degree of official censure. It may also be issued when other, less severe methods have failed to correct the behavior.

2.4.6.4. RICs, LOCs, LOAs or LORs no longer contained in a PIF or UIF. Air Force records contained in other Air Force records systems, not a unit PIF or UIF (for example, senior officer UIFs), may not be rescinded by a commander or civilian director. After the disposition date of the record (in either a PIF or UIF) has passed, members may apply to the Air Force Board for Corrections of Military Records to have their records of RICs, LOCs, LOAs, or LORs removed from other Air Force records systems.

Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice. As the LOR and UIF are not maintained in the applicant's personnel record, there is no action for the Board to take on the request to dismiss and expunge his UIF.

The complete advisory opinion is at Exhibit C.

AFPC/DP3SP recommends denying the applicant's request his OPR, dates of 1 Jul 19 thru 30 Jun 20 be removed from his personnel records. The applicant's OPR in question was a referral OPR due to him making repeated disparaging remarks in violation of EO policies. The applicant contends his comments did not violate EO policies, were misconstrued and used to derail his career. Additionally, the phrasing in the subject OPR's derogatory comment references an instance in a previous reporting period known by the chain of command but not reported in that period's OPR, violates DAFI 36-2406, 1.12.3.4 – Prior Events, and he states the disparaging comments were "neither routine nor were they significant," per DAFI 36-2406, 1.10.3.1. Finally, he contends, his rebuttal to the referral evaluation was not considered, as the comments in Section V of the OPR were already in place prior to endorsement by all parties in his rating chain.

Though an official complaint through the Military Equal Opportunity was not received or processed; per DAFI 36-2710, *Equal Opportunity Program*, paragraph 1.3.26.3, complaints are to be processed promptly and at the lowest possible level and at the earliest possible time. The referenced LOR (not in the official record or provided by the applicant) and subsequent referral

OPR for the alleged deviation in standards was the “lowest level” processing prior to an official complaint should one have been processed.

Per DAFI 36-2406, 1.10.5.1.2, comments from the subsequent evaluator are not to be included until after the rebuttal is received or rebuttal period has passed. Though an unsigned, draft report was obtained by the applicant with comments in Section V of the performance report, the comments were positive in nature and did not include the required referral comment per DAFI 36-2406, 1.10.5.3.2.2.1. (*I have carefully considered (ratee's name) comments to the referral document of (date)*), which indicates the rebuttal had not been reviewed and/or considered at that time.

Additionally, the applicant claims the commander was attempting to save his own career via conversations with the unit’s first sergeant during the matter in question. No evidence was provided corroborating these claims and/or conversations.

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 3 Jan 23 for comment (Exhibit E), and the applicant replied on 1 Feb 23. In his response, the applicant strongly disagrees with AFPC/DP3SP’s recommendation to deny his request to remove his referral OPR from his records and requests the Board to consider his rebuttal. He contends at no time did his behavior constitute “unlawful discrimination” or “sexual harassment” as defined by DAFI 36-2710, therefore, was not a deviation in behavior requiring documentation per DAFI 36-2406, 1.8.3. He contends his LOR and referral OPR failed to demonstrate how the specific language (disparaging remarks) he used met the DAFI 36-2710 definitions of discrimination and/or harassment. He argues the advisory did not address this issue, therefore, the referral bullet and accompanying statement on the reverse side of the referral OPR are false. He further argues that had his commander consulted with the servicing EO office, he would have been advised this incident did not constitute unlawful discrimination or harassment. He provided a copy of the original LOR to prove his commander admitted he was previously “verbally counseled” by the squadron first sergeant in 2018 for the first incident. However, the OPR for that rating period of time contained no comments regarding this counseling, therefore, it was not IAW DAFI 36-2406, 1.12.3.4, to include that event in his Referral OPR for the period 2019-2020. Finally, he disagrees with the AFPC/DP3SP’s statement although the draft referral OPR Section V comments were obtained prior to receipt of the rebuttal, it did not matter because they were “positive in nature.” AFI 36-2406, 1.10.5.1.2, explicitly states, “Do not include subsequent evaluator comments on the referral OPR until after the rebuttal is received or rebuttal period has passed.” The term “positive in nature” is subjective and AFPC’s opinion that the Section V comments were positive. The DAFI was not followed, and the positiveness of the comments (or lack thereof) is irrelevant.

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 not the victim of an error or injustice. The Board concurs with the rationale and recommendation of AFPC/DP2SSM and

AFPC/DP3SP and finds a preponderance of the evidence does not substantiate the applicant's contentions. Specifically, the Board notes the UIF is no longer maintained in the applicant's personnel record, therefore, this portion of his request is moot. Regarding the applicant's request to remove his 2019-2020 referral OPR from his MPR, contending "the erroneous, unjust and unauthorized actions on the part of his chain of command and thus the United States Air Force resulted in a violation of his basic rights and a completely unwarranted performance report," the Board disagrees. IAW DAFI 36-2406, paragraph 1.10.3.2, when an officer fails to meet standards in any one of the listed performance factors, in Section III or Section IX of the OPR, the overall evaluation will be a "Does Not Meet Standard" and must be referred. While the applicant contends that at no time did his behavior constitute unlawful discrimination or sexual harassment, his chain of command determined his remarks made in text messaging with a co-worker and on social media were inappropriate, offensive, and unbecoming of a commissioned officer, causing harm to the organizational climate of his unit; warranting Section III: *Job Knowledge, Leadership Skills (to include Promoting a Healthy Organizational Climate), Professional Qualities, Organizational Skills, Judgement and Decisions, Communication Skills*) of his OPR for the period 1 Jul 19 thru 30 Jun 20, to be rated "Does Not Meet Standards." Therefore, the Board recommends against correcting the applicant's records by removing his 2019-2020 referral OPR from his MPR.

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 the Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2022-01124 in Executive Session on 22 Feb 23.

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Panel Chair

Panel Member

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Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 13 May 22 and 24 Jun 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DP2SSM, 24 May 22.
- Exhibit D: Advisory Opinion, AFPC/DP3SP, w/atchs, dated 30 Dec 22.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 3 Jan 23.
- Exhibit F: Applicant's Response, w/atchs, dated 1 Feb 23.

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Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings pertaining to Docket Number BC-2022-01124, as required by DAFI 36-2603, paragraph 4.12.9.

12/12/2023

X

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Board Operations Manager, AFBCMR

Signed by

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AFBCMR Docket Number BC-2022-01124

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