

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2022-01390

XXXXXXXXXX

**COUNSEL:** NONE

**HEARING REQUESTED:** YES

### APPLICANT'S REQUEST

The Referral Officer Performance Report (OPR) for the period 1 August 2014 through 6 July 2015 be removed from his record.

### APPLICANT'S CONTENTIONS

The contested OPR is improper because it contains comments regarding his performance outside the rating period. The OPR reflects he received a Letter of Admonishment (LOA). He did not receive the LOA during the rating period. He received the LOA on 10 August 2015, more than one month after the reporting period ended. While leadership could have elected to extend the rating period, they chose not to do so. In accordance with AFI 36-2406, *Officer and Enlisted Evaluation Systems*, paragraph 1.12.6.1 and 1.12.7.1, evaluators are authorized to comment on substandard performance outside the reporting period; however, the evaluator is only permitted to refer to the underlying performance, behavior, or misconduct itself and not that the conduct that resulted in administrative action. Here, the evaluator expressly mentioned the administrative action and linked it to the underlying performance. This error is an injustice because it leaves the promotion board with the mistaken impression that he received adverse administrative action during the rating period.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is a currently serving Air Force Reserve major (O-4).

On 10 June 2005, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, the applicant entered the Regular Air Force.

The applicant received a referral OPR for the period 1 August 2014 through 6 July 2015. Section III. Performance Factors and Section IX. Performance Factors (Professional Qualities), reflects "Does Not Meet Standards." The referral report was based on the comment "Inappropriately hid rookie error at last assignment for which he received [an] LOA; lesson learned-top performer here." Section V. Additional Rater Overall Assessment, indicates "Comments from the ratee were requested but were not received within the required period."

On 28 March 2022, the Evaluation Reports Appeal Board (ERAB) denied the applicant's request that the OPR with a closeout dated of 6 July 2015 be void. The ERAB was not convinced there was an error or injustice based on the documentation presented. The board concluded the OPR was accurate at the time of completion. In addition, AFI 36-2406, paragraph 1.12.6.1 and 1.12.7.1 authorizes evaluators to comment on substandard performance outside the reporting period (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, court-martial conviction, etc.) Accordingly, the 2015 OPR was processed accurately and the ERAB denied the request to void.

On 30 June 2022, according to DD Form 214, the applicant resigned from the Regular Air Force and received an honorable character of service. He was credited with 17 years and 21 days of total active service. His narrative reason for separation is "Intradepartmental Transfer."

On 1 July 2022, according to Reserve Order XXX, dated 20 July 2022, the applicant was appointed as a Reserve of the Air Force.

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

## **APPLICABLE AUTHORITY/GUIDANCE**

AFI 36-2406, *Officer and Enlisted Evaluation Systems*, dated 2 January 2013, Corrective Actions Applied on 5 April 2013, paragraph 1.10.2.1. Vague Comments. Do not make non-specific and/or vague comments about the individual's behavior or performance. Example: "Due to a recent off-duty incident, Lt White's potential is limited." They do not fully explain the incident or behavior, nor do they justify how and why their potential is limited. When doubt arises as to whether a comment is a referral comment or not, refer the evaluation. Also see paragraph 1.12.7. Note: If the comment was on your evaluation, would you want the opportunity to respond to that comment; if yes, refer the evaluation. It is better to afford the ratee the due process now while all evaluators are available, than to try and refer it later if directed by the ERAB or AFBCMR.

Paragraph 1.10. Referral Evaluations. Referral procedures are established to allow the ratee due process by giving the ratee an opportunity to respond and/or rebut any negative ratings or comments before it becomes a matter of record. Additionally, it allows evaluators to consider all the facts, some they may not have been aware of, prior to the evaluation becoming a matter of record.

1.10.3.1. Comments in any OPR, EPR, LOE or TR, regardless of the ratings if applicable, or the attachments to that evaluation, that are derogatory in nature, imply or refer to behavior incompatible with, or not meeting minimum acceptable standards of personal or professional conduct, character, judgment or integrity, and/or refer to disciplinary actions.

1.10.3.2. 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 Standards" evaluation and the evaluation must be referred. Note: If the evaluation is marked "Does Not Meet Standards," there must be a comment pertaining to the behavior in the referring evaluator's assessment block. Comments in the referral memorandum do not meet this requirement.

1.12.6. Performance Outside the Reporting Period.

1.12.6.1. Duty History or Performance Outside the Current Reporting Period. Do not comment on duty history or performance outside the current reporting period, except as permitted by paragraphs 1.12.6.5. and 1.12.7.1. However, since performance in past jobs is relevant in the preparation of PRFs, raters may include it on PRFs.

1.12.6.5. 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.

#### 1.12.7. Derogatory Information and Disciplinary Actions

1.12.7.1.4. 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, court-martial conviction, etc.

### **AIR FORCE EVALUATION**

AFPC/DP3SP recommends denying the application. Although the applicant may not have received the LOA until after the closeout, AFI 36-2406, paragraph 1.12.6.5 (currently codified in DAFI 36-2406, paragraph 1.12.3.4) authorizes evaluators to comment on substandard performance outside of the reporting period. Specifically, the applicant is arguing the timing of the LOA and its receipt after the closeout, but the LOA referenced in the report is for behavior which occurred during the reporting period (October 2014). Therefore, based on the analysis of the facts and documentation provided, the applicant has not provided sufficient evidence to prove an error or injustice occurred. If the LOA is only in question, the evaluation may be corrected by redacting the portion of the comment "for which he received a LOA," as the actions of the applicant still exist and does not appear the applicant is contesting these actions.

In addition, the applicant did not file the request in a timely manner. This action took place approximately seven years ago, outside the three-year time limit. While the applicant states "I believe this error was easily undiscovered," this would be the opposite as the applicant received the referral, had seven years to review any Air Force polices for reference and submit an appeal within the prescribed time.

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 3 January 2023 for comment (Exhibit D), the applicant responded indicating AFPC/DP3SP cites the incorrect AFI provision - AFI 36-2406 1.12.6.5 (now found in DAFI 36-2406, 1.12.3.4). That provision accounts for events which came to light after an evaluation became a matter of record, and then permits those events to be mentioned in the ratee's next evaluation. That is not the situation presented here. AFPC/DP3SP, despite conceding that the LOA was issued after the rating period, attempts to justify the injustice by pointing out that the alleged misconduct precipitating the LOA occurred during the rating period. While this is true, it overlooks the fact that the alleged misconduct was not substantiated until the LOA was issued. As such, the alleged misconduct could not be mentioned. Removing reference to the LOA but leaving reference to the alleged misconduct does not cure the injustice. AFI 36-2406, paragraph 1.12.4.1 prohibits the inclusion of derogatory information based on unsubstantiated information. The misconduct alleged to have occurred during the rating period was not substantiated as of the closeout date of the OPR, any mention of it whatsoever is inappropriate and is an injustice. Similarly, if left standing alone, the derogatory comments on the referral OPR in question would be impermissibly vague in violation of AFI 36-2406, paragraph 1.10.2.1.

The applicant's 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 not the victim of an error or injustice. The applicant claims evaluators are authorized to comment on substandard performance outside the reporting period; however, the evaluator is only permitted to refer to the underlying performance, behavior, or misconduct itself and not that the conduct that resulted in administrative action. Consequently, he suffered an injustice because the OPR comments leave the promotion board with the mistaken impression that he received adverse administrative action during the rating period. The applicant contentions are duly noted; however, he has failed to provide sufficient evidence he was rated unfairly or the report is in error. Evaluators were responsible for assessing the applicant's performance during the period in question and are presumed to have rendered their evaluations based on their observation of the applicant's performance. Specifically, evidence indicates the applicant received a referral OPR because he failed to meet standards listed in Section III and Section IX of his OPR; therefore, the OPR had to be referred to him. This allowed the applicant due process by giving him an opportunity to respond to, or rebut any negative ratings or comments before it became a matter of record. Conversely, according to Section V of the OPR in question, the applicant was offered but declined to provide any comments. Now, over seven years later, he claims the comments in his OPR were inappropriate, vague, and cannot be substantiated. The applicant accepts his behavior that precipitated the LOA occurred during the rating period for the OPR in question but argues that contrary to AFI 36-2406, the LOA was issued after the closeout of the OPR. Furthermore, the applicant claims AFPC/DP3SP concedes the LOA was issued after the reporting period; however, this Board has not seen such evidence. To the contrary, the Board finds the report was accomplished in direct accordance with the applicable guidance. Once a report is accepted for file, only strong evidence to the contrary warrants correction or removal from an individual's record. The burden of proof is on the applicant and he has not substantiated that the contested OPR was not rendered in good faith by all evaluators based on knowledge available at the time. In view of the forgoing, 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-2022-01390 in Executive Session on 2 February 2023:

, Chair, AFBCMR  
, 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 28 April 2022.

Exhibit B: Documentary evidence, including relevant excerpts from official records.

Exhibit C: Advisory Opinion, AFPC/DP3SP, dated 30 December 2022.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 3 January 2023.

Exhibit E: Applicant's Response, dated 25 January 2023.

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

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Board Operations Manager, AFBCMR