



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-01447

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

Correct his official military personnel record to reflect:

1. Withdrawal of substantiation of Allegation 4, Inspector General of the Air Force Case **Work-Product**, Report of Investigation, dated Sep 18
2. Removal of AF/CV Letter of Admonishment, dated 24 Oct 18
3. Promotion/Advancement on Retired List to grade of Brigadier General (O-7) (**Relief requested outside AFBCMR authority**)

APPLICANT'S CONTENTIONS

He was selected for promotion to brigadier general (O-7) in May 16 and was submitted to the Senate for confirmation on 6 Dec 16. The list was not considered and confirmed by the Senate before Congress adjourned. The list was returned to the President under Senate rules, causing the nominations to go through the confirmation process again. During the repeated promotion approval process, anonymous complaints were filed with the Air Force Inspector General regarding fraud, waste, and abuse of telework policies, resulting in a Command Directed Investigation (CDI). The Air Force Inspector General (SAF/IG) initiated a parallel senior officer investigation to determine if he, in his official capacity at the time of the alleged abuse, had failed to support the Wing Commander's Fraud, Waste, and Abuse (FWA) prevention program. During the course of the investigation, his name was removed from the promotion list pending the results of the investigation. The brigadier general promotion list was confirmed by the Senate on 28 Sep 17 while the above investigation was ongoing.

As a result of this investigation, he was served with a Letter of Admonishment (LOA) on 16 Nov 18, by the Air Force Vice Chief of Staff, and given 45 days to respond. At that time, he was provided with a heavily redacted copy of the Report of Investigation (ROI) and none of the exhibits, including the underlying evidence supporting the report. On 26 Nov 18, 7 Dec 18, 20 Dec 18, 21 Dec 18, and 11 Jan 19, he requested documentation in support of the LOA, and other related documentation to allow him to respond to the LOA. All five requests went unanswered. Due to the repeated refusals to provide all of the requested documentation, on 11 Jan 19, he submitted a request for extension to the LOA response deadline until 8 Mar 19, in order to permit time to review the evidence, assuming the above evidence would be provided within seven days of that request. The repeated refusals denied him access to the evidence necessary to prepare his case and respond before he was forced to retire on 1 Feb 19. He was forced to retire on 1 Feb 19, with 24 years of service, after his request to delay his retirement was denied by the Adjutant General.

On 9 Feb 19, through counsel, he sent a request for discovery and Freedom of Information Act (FOIA) request for records relating to the LOA. On 26 Feb 19, the Air Force responded to his

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Controlled by: SAF/MRB

Work-Product

Limited Dissemination Control: N/A

POC: SAF.MRBC.Workflow@us.af.mil

discovery request, and while some of the information was provided, the Air Force failed to provide most of the requested information and did not provide a justification for the omission. This denied him access to meaningful evidence needed to defend himself and provide a complete and accurate response to the LOA.

On 21 Mar 19, he responded to the LOA and requested that it be rescinded. His response was accompanied by a response from his counsel. On 25 Apr 19, the Air Force Vice Chief of Staff (AF/CV) issued a decision and found the LOA would be filed in his Personnel Information File. The decision was sent out on 15 May 19 and received and acknowledged by him on 21 May 19.

The entire basis for the SAF/IG investigation is the statement of one individual that he was aware of the FWA, failed to act on that knowledge, and discouraged him from reporting the FWA. To reach that conclusion the Investigating Officer (IO) committed multiple errors, ignored a wealth of evidence contrary to her conclusions, and withheld key evidence from AF/CV who relied on the unsupported ROI in issuing the LOA that ended his career and prevented his promotion to brigadier general (O-7).

The Air Force obfuscated key evidence by failing to record critical interviews and provided only summary Memorandums for Record (MFR) rather than generating full transcripts as required by Air Force Instruction (AFI) 90-301, *Inspector General Complaints Resolution*, paragraphs 3.42.2. – 3.42.2.4.. The Air Force stated in the ongoing FOIA litigation that no corresponding recordings exist for four interviews, which were all MFRs summarizing witness interviews without transcripts. Two of the missing recordings and transcripts were of critical witnesses who provided central testimony in this case. The IO's violation of AFI 90-301 denied the AF/CV, and now denies the Board, the full testimony of these key witnesses. In some of the transcripts, the start and stop times do not match up with the length of the recordings, differing by as much as thirteen minutes; content appears to be missing. When evidence is omitted, lost, or destroyed, one may infer its contents were unfavorable to the possessor.

Of serious concern was the IO's conscious disregard of evidence offered concerning the key witness's credibility and character. Two senior officers were interviewed by the IO, then dismissed, though they presented direct knowledge of credibility and character. An MFR provided by one of the senior officers, though relevant, was not mentioned in the ROI, and this key piece of evidence was hidden from AF/CV consideration. The IO improperly wrote an MFR capturing her interview with the second senior officer rather than recording and providing a full transcript. This senior officer later provided a sworn statement that directly contradicts the IO's MFR. Other complaints were made against the key witness that were known, or should have been known by the IO, as the applicant raised them as an issue of credibility during his interview with the IO. He forwarded these concerns to SAF/IG via AF Form 102, *Inspector General Personal and Fraud, Waste & Abuse Complaint Registration*. The Air Force denied finding any responsive documents to FOIA requests for documents related to IG complaints against the key witness, as of 15 Oct 20, but later released documents that showed several IG complaints against him. These foregoing complaints should have been presented to AF/CV prior to the LOA being served. However, no mention of complaints against this individual was made in the ROI credibility determination so they were not part of the record considered by the AF/CV. This failure to include the above impeachment evidence significantly undercuts the credibility determination and further supports withdrawing the substantiation of the sole allegation against him.

Additionally, the IO failed to highlight significant inconsistencies among the testimony of various witnesses regarding key facts, including the timeline of key events regarding the allegation

substantiated against him. It is clear from the interview transcripts that the IO attempted to steer witnesses toward their preferred timeline of events and away from alternate timelines. The ROI also fails to consider the key witness changed his testimony and presented three different potential timelines for the critical conversation with the applicant, while providing no reason for changing those timelines. The entire ROI and credibility determination are built on the timing of the conversation and who occupied the Wing Commander position at that time. Further, the IO fabricated a critical statement of fact in the ROI which a witness never said. Specifically, the IO falsely or inaccurately stated in the ROI the contents of an MFR provided included the applicant, whereas in the actual MFR, the applicant is not mentioned. The IO's credibility analysis remains inadequate and unsupported by the full record, and fails to assess witness credibility, motive, and bias. Conversely, the ROI failed to discuss evidence of the applicant's good character in the credibility determination. He made prompt, good-faith efforts to correct a rogue investigation and possible misconduct and encouraged actions to permit proper investigation. His sworn statement clearly and openly addressed his intent.

The faulty credibility determination is compounded because it forms the basis for accepting the key witness's account, despite internal inconsistencies and completely disregards the applicant's account. There were serious discrepancies that should have been weighed by the IO and presented to AF/CV for consideration; however, they were not even mentioned much less analyzed by the IO in coming to the conclusion that the key witness was more credible than myself. The preponderance of evidence combined with proper credibility determinations does not support substantiation of the allegation against him and justifies removal of the LOA and retroactive promotion or advancement.

After multiple requests for documentation went unanswered, he filed a discovery and FOIA request for administrative due process and the opportunity to see the evidence against him from the SAF/IG files that formed the basis of the substantiated allegation as well as exculpatory evidence from others. On 16 Aug 19, the Air Force acknowledged receipt of the FOIA and Privacy Act request noting the initial request had been properly withheld and stating the reasons. On 29 Aug 19, though counsel, he appealed the Air Force decision. When he received no response, he filed a FOIA complaint with the U.S. District Court for the District of Columbia on 10 Dec 19 (sic). He then filed a motion for summary judgment that remains pending at the time of this application. In summary, as of the filing of his summary judgment motion, and more than two years after his FOIA request, the Air Force had released only 22.9 percent of the pages listed in the Vaughn index in unredacted form, 17 percent in partially redacted form, 5.8 percent in completely blacked-out form, and continues to withhold 54.3 percent of the listed pages. Heavy redactions on the documents that were released impaired his ability to prepare his appeal to the LOA and continue to deny his access to the majority of evidence to prepare this records correction request. The blanket denial of access to evidence creates a sense of futility and unnecessarily adds to the exceptional stress on airmen under investigation. To date, he has paid \$68,804.29 in attorney's fees for his appeal of the LOA and FOIA lawsuit.

Further, the other subject of the SAF/IG ROI has since been promoted to brigadier general (O-7) despite his superior position and knowledge of the FWA. Despite the substantiation of an allegation against him, the other subject was permitted to remain on full time duty in Active Guard Reserve (AGR) status and has since been promoted to brigadier general (O-7). Accordingly, the more favorable treatment of the other subject despite his superior position and responsibility, superior knowledge, and failure to prevent or correct the teleworking FWA provides an additional independent equitable basis for promoting the applicant or advancing him to the grade of brigadier general (O-7).

But for the failure of the Senate to vote for confirmation of his promotion list before they adjourned, he would have been promoted to brigadier general (O-7) on 1 Feb 17. It was during the second confirmation process that his name was removed from that promotion list due to the pending SAF/IG investigation. He served honorably in general officer positions for the last two years of his career and during the entire pendency of the SAF/IG investigation, so he should have been considered for promotion and it should have been backdated to the date he would have been confirmed had he not been removed from the promotion list.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air National Guard colonel (O-6) awaiting retired pay at age 60.

On 6 Dec 16, according to documentation provided by the applicant, his name was included on the list of Presidential nominees for promotion to brigadier general (O-7) that was forwarded for Senate confirmation, under **Attorney-Client**

On 3 Jan 17, according to documentation provided by the applicant, the list of Presidential nominees for promotion to brigadier general (O-7), under **Work-Product** was returned to the President under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate.

On 1 Feb 17, according to AF Form 2096, *Classification/On-the-Job Training Action*, the applicant was awarded Air Force Specialty Code (AFSC) 90G0 [General Officer] and assigned to the ATAG [Assistant Adjutant General, Air] position.

On 28 Aug 17, according to documentation provided by the applicant, he was a subject of a SAF/IGS-initiated senior official investigation.

On 5 Sep 17, according to documentation provided by the applicant, his name was removed from the previous list of Presidential nominees for promotion to brigadier general (O-7), under **Work-Product** with the amended list forwarded for Senate confirmation under **Work-Prod...**, which was confirmed on 28 Sep 17.

In Sep 18, according to documentation provided by the applicant, the allegation against the applicant, as a subject of the SAF/IGS senior official investigation, was substantiated.

On 1 Sep 18, according to AF Form 2096, the applicant was assigned to the Chief of Staff – Air position.

On 24 Oct 18, according to documentation provided by the applicant, he was issued a Letter of Admonishment by AF/CV.

On 16 Nov 18, according to documentation provided by the applicant, he acknowledged receipt of the Letter of Admonishment.

On 31 Jan 19, the applicant was furnished an honorable discharge from the [State] Air National Guard, in the grade of colonel (O-6), with Authority and Reason: AFI 36-3209, Paragraph 2.49.

Transfer to the USAF Reserve Retired List, and credited with 24 years, 0 months, and 0 days total service for retired pay.

On 31 Jan 19, according to Special Order [Work-Product], dated 21 Jun 19, the applicant was relieved from assignment and honorably discharged from the [State] ANG effective 31 Jan 19, and transferred to the United States Air Force (USAF) Reserve and assigned to Headquarters, Air Reserve Personnel Center (HQ ARPC), effective 1 Feb 19. The applicant applied for transfer to the USAF Reserve Retired List.

On 1 Feb 19, according to Reserve Order [Work-Product], dated 26 Dec 18, provided by the applicant, he was relieved from current assignment, assigned to the Retired Reserve Section and placed on the USAF Reserve Retired List.

On 22 Mar 19, according to documentation provided by the applicant, he submitted a response to the Letter of Admonishment issued by AF/CV.

On 25 Apr 19, according to documentation provided by the applicant, AF/CV rendered his decision to let the Letter of Admonishment stand and be filed in the applicant's Personnel Information File.

On 21 May 19, according to documentation provided by the applicant, he acknowledged receipt and understanding of AF/CV final decision regarding the Letter of Admonishment.

On 19 Dec 19, according to documentation provided by the applicant, he filed a complaint with the United States District Court for the District of Columbia ([Work-Product] v. US Air Force, Civil Action No. 1:19-cv-03784) alleging violation of the Freedom of Information Act.

On 15 Oct 20, according to AF/JACL memorandum, provided by the applicant, a final response was provided by the Air Force to the applicant regarding his FOIA request.

On 1 Mar 21, according to DoD-IG memorandum, provided by the applicant, a response was provided by the DoD IG regarding his FOIA request, referring the applicant to the Air Force for processing of documents determined to be appropriate for release.

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

APPLICABLE AUTHORITY/GUIDANCE

AFI 90-301, *Inspector General Complaints Resolution*,

8.4. Closing a Senior Official Investigation.

8.4.2. SAF/IG will forward substantiated cases to the AF/CV, MAJCOM/CC (or equivalent), or SAF/AA (as applicable) for consideration of possible command action, to include action deemed appropriate to correct the negative effect of substantiated wrongdoing on individuals and/or the unit. Substantiated cases involving Air Force civilian senior officials, are referred to SAF/AA for action IAW AFI 36-901, *Civilian Senior Executive Management*. AF/CV takes command action for ANG subjects. SAF/IG will send AF/CV, MAJCOM/CC (or equivalent), or SAF/AA (as applicable), an unredacted copy of the substantiated ROI and a copy of all exhibits for their use in determining the appropriate command action. Additionally, SAF/IG

will send AF/CV, MAJCOM/CC or SAF/AA a redacted copy of the ROI for possible use by the subject in responding to potential command action as deemed appropriate by AF/CV, MAJCOM/CC or SAF/AA.

10.7. *Restrictions for Use of IG Records.* IG records are subject to the following restrictions.

10.7.1. Do not use IG records as attachments or exhibits to other official records without the written approval of the authority responsible for making release determinations, as delegated in this instruction.

10.7.2. IG records must be returned to the authority responsible for making release determinations or properly destroyed upon completion of stated need.

10.7.3. Do not further release (in whole or in part) IG documents without proper authorization from the authority responsible for making release determinations.

10.7.4. Do not act on FOIA or PA requests for IG records. If, while possessing an IG document, an office receives a FOIA or PA request, and if the document is a responsive record, then accomplish a referral of the request to the appropriate authority responsible for making release determinations (referral procedures are found at DoDM 5400.7 AFMAN 33-302, paragraph C1.5.9). Include a copy of any responsive documents in the referral package. The authority responsible for making release determinations acts on the request.

10.7.5. Comply with the provisions of the PA Program in the management of IG records.

AFI 36-2907, *Adverse Administrative Actions*,

2.1. *Use of Counseling, Admonitions, and Reprimands.* General Officers, Commanders, First Sergeants, supervisors, and other persons in the member's administrative or operational chain of command can issue administrative actions. This includes issuing administrative counseling, admonitions, and reprimands to Reservists who commit an offense while in civilian status. Admonishments and reprimands can be used to address an Airman's first instance of misconduct, depending on the severity of the Airman's actions and its impact on the mission.

2.1.1. *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. A preponderance of the evidence means simply evidence which, when fairly considered, is more likely than any evidence opposed to it. Consider whether such proof is available before initiating the administrative action. If such proof is lacking, administrative action may be determined legally insufficient and, as a result, could be set aside. There is no requirement to prove any allegation beyond a reasonable doubt.

2.3. *Letters of Admonishment.* An admonishment is more severe than a Letter of Counseling/Record of Individual Counseling. Members of (i.e., non-commanders in) the administrative and operational chain of command use it to document an infraction serious enough to warrant the Letter of Admonishment. It could be used to document a first offense, or it could be used to address behaviors not corrected through counselings. Do not use it when a reprimand is more appropriate. Members of (i.e., non-commanders in) the administrative or operational chain of command may recommend the commander establish or file the action in an UIF. For officer personnel, if the Letter of Admonishment is not filed in the UIF, it must be filed in the individual's Personnel Information File.

2.5. *Administering Records of Individual Counseling, Letters of Counseling, Letters of Admonishment, or Letters of Reprimand.*

2.5.1. Administer a counseling, admonition, or reprimand, verbally or in writing. If written, the letter states:

2.5.1.4. Regular Air Force, Air Force Reserve and Air National Guard individuals on Title 10 status (enlisted and officer) will be allocated 3 duty days (current date plus 3 duty days) to acknowledge the intended actions and provide pertinent information before the commander makes the final decision on the administrative action. For Non-Extended Active Duty Reservists and Air National Guard Drill Status Guardsman who depart the duty area prior to the 3 duty days allowed for acknowledging intended actions, the individual has 45 calendar days from the date of receipt of the certified letter to acknowledge the notification, intended actions, and provide pertinent information before the commander makes the final decision. In calculating the time to respond, the date of receipt is not counted, and if the individual mails their acknowledgment, the date of the postmark on the envelope will serve as the date of acknowledgment. The individual is presumed to be in receipt of official correspondence if it is delivered by certified mail to the individual's address or best available address.

2.5.2. Letters of Counseling, Letters of Admonishment, and Letters of Reprimand, will include, and list as attachments, relevant statements, portions of investigations, reports, and other documents that serve, in part or in whole, as the basis for the letter. Redact such evidence, as appropriate, and mark, "For Official Use Only." Any documents that are released from investigations, reports, etc., should be accompanied by a cover memo indicating that the documents are "For Official Use Only" and specify any handling requirements. There is no requirement to create statements or documentary evidence, which otherwise does not exist.

2.5.2.1. Documents, the release of which requires approval of officials or agencies other than the issuing authority, (e.g., SAF/IG, Inspector General Department of Defense, Air Force Office of Special Investigations), should not be released to the member until such approval is obtained. Release approval should be obtained before the letter is issued. When impractical to obtain release approval before the letter is issued, obtain such approval as soon as possible after service of the letter on the member and release the documents at that time.

AFI 36-2501, Officer Promotions and Selective Continuation,

9.5. *Unfavorable Information (Also Applies to Reserve Component Boards).* For the purposes of this instruction, unfavorable information consists of documentation filed in a SOUIF maintained by the SAF/IG, under provisions of AFI 90-301, *Investigations of Allegations Against Senior Officials.*

9.5.2. If an officer is recommended for promotion or Federal recognition by the board, the SECAF, based on the significance of the unfavorable information, or information received after a board has convened may:

9.5.2.1. Initiate action to remove the officer's name from the report of the board consistent with the requirement of Title 10, U.S.C., DoDI 1320.14, paragraph 6.3. and this instruction (appropriate law and regulation for Reserve component boards)

11.5. *Removal From a Report of a Selection/Federal Recognition Board* (Also Applies to Reserve Components). In accordance with Title 10, U.S.C., Sections 618(d) and 14310(a), the name of an officer may be removed from the report of a selection or Federal recognition board only by the President.

Air National Guard Instruction (ANGI) 36-2501, General Officer Federal Recognition Boards for General Officer Appointment or Promotion in the Air National Guard,

3.4. *Officers with Substantiated Adverse Information.*

3.4.3. If an officer is found qualified for federal recognition by the GOFRB, the Secretary of the Air Force, based on the significance of the unfavorable information, or information received after a board has convened may:

3.4.3.1. Initiate action to withhold federal recognition from the officer consistent with the requirements of this instruction.

3.5. *Promotion Propriety Actions.*

3.5.3. The appointment of officers to a higher grade, who are on lists of officers found qualified for federal recognition, may be involuntarily delayed IAW 10 U.S.C. §14311 based on investigations and proceedings or lack of qualifications. The procedures set out in AFI 36-2501, paragraph 11.3 will be utilized in such cases for officers who are on lists of officers found qualified for federal recognition (i.e., the list of officers found qualified by the GOFRB has been approved by the Secretary of the Air Force and forwarded to the Secretary of Defense).

3.5.4. A GOFRB is not a selection board or promotion board under 10 U.S.C. §14101. Unlike active duty and reserve promotions, which are governed by title 10, United States Code and require Presidential action to deny promotion to an officer favorably recommended for promotion by a selection board, title 32, United States Code, which governs federal recognition, does not. Accordingly, the Secretary of the Air Force always has discretion, even after Senate confirmation, to refuse to extend federal recognition to an officer when in the best interests of the Air Force.

AIR FORCE EVALUATION

SAF/IGS recommends denying the applicant's request to withdraw the substantiated allegation against him from SAF/IG Case Number [Work-Product]. After careful review of the entire application, as well as the ROI, insufficient evidence was found to warrant modifying or voiding the ROI.

The applicant contends, and he did previously in his response to the LOA, that the IO and Legal Advisor team used flawed methodology and reasoning in conducting the investigation and completing the ROI which substantiated the allegation against him. He further asserts information provided to the IO and/or the conclusions reached in the ROI were incorrect or were otherwise hidden from command consideration.

This application brings up inconsistencies the original IO considered, or which were provided with the ROI. It also repeats criticisms of the IO's methodology and thoroughness, specifically regarding credibility, which were raised by the applicant and reconsidered by AF/CV in his response to the LOA.

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 5 Jan 23 for comment (Exhibit D), and the applicant replied on 4 Feb 23. In his response, the applicant contended the preponderance of evidence in this case substantiates that he was the victim of multiple errors and injustices that justify his requests. The advisory opinion perpetuates the same skewed and selective presentation of the evidence that led to the erroneous and unjust decision to substantiate the fundamentally flawed SAF/IG investigation and concludes the application does not provide sufficient basis to warrant changing the ROI's conclusion. Instead, it continues to rely on selective

and biased presentation of the evidence to reach that conclusion. This suggests it is sufficient and fair presentation of the evidence for the IO to consider conflicting evidence without presenting it and the basis for her conclusions to the deciding official.

The advisory opinion fails to address the IO's violation of the SAF/IG regulation by failing to record critical interviews and providing only summary MFRs instead of full transcripts as required by AFI 90-301, paragraphs 3.42.2.3. and 3.42.2.4.. Without recordings and transcripts, it is impossible to know what questions were asked and answers given. There is no way to determine if the IO's interview summaries included confirmation bias of her theory of the case by only including information from the interviews that supported her narrative and excluding statements that were contrary to that narrative. There were multiple instances in which the IO failed to mention critical evidence that was contrary to her conclusions in the ROI. Thus, the ROI failed to maintain an impartial and balanced tone and exclude any biases as required by AFI 90-301. The IO left the AF/CV and the applicant in the dark on what the interview evidence contained and prevented AF/CV from making an informed decision on witness credibility.

The advisory opinion discards arguments that witness testimony was hidden from AF/CV consideration and ignores the IO's blatant violation of AFI 90-301. It excused without addressing the IO selectively presenting evidence in the ROI that supported her conclusion and failure to present contrary evidence. The SAF/IG system buttressed that selective presentation by withholding the vast majority of documents and redacting key portions that presented evidence contrary to the IO's conclusions. The applicant was denied the opportunity to present in his original appeal to AF/CV the contrary evidence that was withheld from him, was buried in the ROI exhibits, and not addressed in the ROI itself, particularly in the credibility determination on which the substantiation of the sole allegation against him rests. The advisory opinion perpetuates the IO's selective presentation of the evidence with a quote of the applicant's statement, which he declares is misleading and contrary to the evidence of record, and he presents his statement in its entirety, as it provides critical context.

To suggest because some airmen may have felt discouraged bringing forward information that it must have been due to his actions ignores two more likely causes for that chilling effect: (1) the AW/CC had been approached on several occasions regarding the issue and had taken no action and made clear he did not want to hear about it; and (2) the individual the applicant spoke with directly caused the chilling effect by mischaracterizing his words and failing to convey his actual encouragement to come forward. The considerable evidence that the AW/CC was the source of the chilling effect was not mentioned at all in the ROI, thereby denying the AF/CV the opportunity to consider this alternative explanation for why airmen stopped coming forward on this issue. The critical credibility determination in the ROI failed to mention evidence supporting the applicant's credibility. The record contained a wealth of evidence supporting his credibility but was not included in the ROI.

Additionally, the advisory opinion fails to address any of the following injustices that provide additional independent basis for his request for relief: the Air Force withheld and continues to withhold documents necessary to prepare an effective defense to the SAF/IG ROI and AF/CV LOA; the other subject of the SAF/IG ROI has since been promoted to brigadier general (O-7) despite his superior position as AW/CC, his superior knowledge of the issue as the direct supervisor, and his failure to prevent or stop the FWA; and the unusual circumstance with the delay in Senate confirmation of the promotion list and his two years' honorable service in brigadier general positions. Thus, the advisory opinion provides no explanation why the injustices occurred

nor any mitigating circumstances or rationale in support of the Air Force actions that led to those injustices.

Further, the advisory opinion's failure to address the Air Force Inspector General policy regarding not releasing documents under FOIA until command action is complete shows a blatant disregard for the effect this policy has on airmen. The applicant was forced to retire before he could file the LOA appeal due to the Air Force delays in releasing information. In the applicant's case, the above policy prevented access to key evidence necessary to even know that certain errors were committed or to fully understand the scope of those errors. A non-exhaustive list of the effects of this policy and Air Force action follows. First, the Air Force withheld documents responsive to his FOIA request, and while this argument was presented in a general sense in the LOA appeal, the extent was unknown until he filed his FOIA lawsuit. It is impossible to know if any additional evidence would shift the preponderance of evidence in his favor. Second, redacted documents shared by the Air Force that were later released under FOIA with fewer redactions show the Air Force improperly withheld relevant evidence. Third, the IO's blatant violation of AFI 90-301 was not presented in the LOA appeal because it was not known until 12 May 21 when the Air Force filed its opposition to his motion for summary judgment in the FOIA case and admitted no recordings had been made. Fourth, the SAF/IG policy not to release documents in response to FOIA until command action is complete is not generally known and was not disclosed in this case until nearly two years after the LOA appeal was filed.

Finally, the advisory opinion states their review finds insufficient basis to overrule the determinations of the individuals who reviewed the evidence and applicable standards and the ROI in 2018, now more than four years after the completion of the investigation, suggesting that the passage of time gives weight to the ROI. It should be noted the delay from presentation of the LOA to the filing of this application has been consumed with a sustained effort to obtain evidence that continues to be held by the Air Force and remains the subject of an ongoing FOIA lawsuit.

As addressed above, new arguments and evidence are presented in this request for correction that were not known or available at the time of the LOA appeal. The applicant requests the Board consider all the evidence and arguments presented to date, including evidence withheld and arguments unavailable at the time of the Mar 19 LOA appeal.

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 not the victim of an error or injustice. The Board concurs with the rationale and recommendation of SAF/IGS and finds a preponderance of the evidence does not substantiate the applicant's contentions. The investigation, Case Number **Work-Product**, was conducted, and its ROI was reviewed, in accordance with AFI 90-301 and the CDI Guide in effect at that time. Regarding the resulting LOA issued by AF/CV, the applicant was afforded due process, in accordance with AFI 36-2907, and upon reconsideration, AF/CV denied the applicant's request to remove the LOA. The applicant's removal from the promotion list was in accordance with Air Force and Air National Guard

guidance, and his subsequent retirement in the grade of colonel (O-6) was appropriate. 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-2022-01447 in Executive Session on 7 Mar 23:

Work-Product

Panel Chair

Work-Product

Panel Member
anel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 20 May 22.

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

Exhibit C: Advisory Opinion, SAF/IGS, dated 9 Dec 22.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 5 Jan 23.

Exhibit E: Applicant's Response, w/atchs, dated 4 Feb 23.

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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