

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2022-01603

XXXXXXXXXXXXXXXXXX

**COUNSEL:** XXXXXXXXXXXXXXXX

**HEARING REQUESTED:** YES

### APPLICANT'S REQUEST

1. His referral officer performance report (OPR) for the reporting ending 23 Sep 19 be removed from his records.
2. The Removal for Cause from Development Education (DE) Designation memorandum dated 25 Nov 19 be removed from his records.
3. All documents pertaining to his removal from command be removed from his records, assignment team documentation and the Air Force Inspector General (IG) database.
4. The mention of his removal from command be removed from all Air Force or affiliated websites.
5. He be considered for a special selection board (SSB) for the CY19D PO619D Line of the Air Force (LAF) Central Selection Board (CSB), CY21C PO621 LAF-A CSB and the CY22B PO622B LAF-A CSB.
6. The removal from senior development education (SDE) in the military personnel data system (MilPDS) be updated to reflect "Ops Deferral."

### APPLICANT'S CONTENTIONS

On 23 Sep 19, he was unjustly removed from command without sufficient supporting evidence for allegedly failing to maintain a healthy command climate. The removal was arbitrary, capricious and an abuse of discretion within the meaning of 5 U.S.C. § 706, Scope of Review, and AFI 51-509, *Appointment to and Assumption of Command*, paragraph 14.2.1.

Counsel, on behalf of the applicant, contends there were two material errors that prejudiced him. First, on 23 Sep 19, he was removed from command without sufficient supporting evidence for allegedly failing to maintain a healthy command climate. The 9 Sep 19 informal inquiry found an unreasonable perception of a toxic command climate. The investigating officer (IO) found he promoted a healthy organizational climate and that there was no tolerance for harassment, unlawful discrimination or retribution. Second the removal from command was unjustly used to support a single referral comment in his OPR alleging he did not meet standards. AFI 36-2406, *Officer and Enlisted Evaluations Systems*, paragraph 1.12.4.1.1., states raters must ensure information used to document performance, especially derogatory information relating to unsatisfactory behavior or misconduct is reliable and supported by a preponderance of the evidence.

He took command of the security forces squadron (SFS) on 6 Jul 18. Previously, he completed a command tour of a large SFS and was rated #1 of 150 majors in the wing. In his assignments, he

demonstrated the ability to build teams and collaborate in challenging environments. During his command of the SFS, the major command inspector general (MAJCOM/IG) identified three superior performers during an inspection and his airmen earned awards. The squadron also won a challenge event and the intramural teams won the basketball and flag football tournaments. The accomplishments indicate unit pride and cohesion and not a hostile climate.

He provides letters of support that show the operational health of the squadron at the time he took command was not acceptable. The unit was administratively incompetent and morale was mediocre. He set about to improve the unit while taking care of airmen. Just three months prior, on 2 Jun 19, he received his OPR from his commander's predecessor which stated he not only met standards but was stratified #5 of 32 lieutenant colonels in the wing (WG).

On 15 Jul 19 the results of the Defense Organizational Climate Survey (DEOCS) were received and just after 28 days of supervision, the Security Forces Group Commander (SFG/CC) informed him he did not meet standards. It was inaccurate for the SFG/CC to accept misperceptions of some disgruntled unit members as the opinion of all unit members or that it was an accurate representation of his actions and behavior.

The SFG/CC initiated an informal inquiry and appointed the SFG deputy commander (SFG/CD) as the IO. The informal inquiry IO found no evidence he failed to meet the requirements of AFI 1-2, *Commander's Responsibilities*. The SFG/CC chose not to conduct a formal command directed investigation (CDI) with any rights of rebuttal. The IO was hardly impartial. The informal inquiry was a pretext to relieve him from command. The SFG/CC directed his deputy to investigate the SFS climate when the logical course of action would have been to work with the wing judge advocate (JA) office and appoint an impartial lieutenant colonel (O-5) outside of the SFG. The Air Force CDI guide clearly calls for commanders to appoint impartial officers and there were many available locally. The IO's impartiality is questioned as he consistently took facts out of context. He also failed to interview the SFS senior enlisted member who was assigned to the squadron from Feb 19 until his permanent change of station (PCS) in Aug 19. Further, the adverse actions taken by the SFG/CC stand in stark contrast to the facts in the inquiry report. The SFG/CC dismissed the IO's recommendations and issued the applicant a "Does Not Meet Standards" OPR based on unreliable evidence. The WG/IG memorandum dated 23 Oct 20 confirms the sole investigation into his behavior found the allegations to be unsubstantiated. This provides further proof the referral OPR was inaccurate, unfair and logically unsound. The unsubstantiated finding by the WG/IG also refutes any notion of perceived reprisal voiced in the informal inquiry report.

During the last week of Aug, he received a blank promotion recommendation form (PRF) from the WG vice commander (WG/CV) for the PO619D board. A blank PRF is highly irregular and was a message to the board to not select the applicant for promotion. This is further proof that his commander had already reached the conclusion he should be relieved based improperly on the DEOCS report and the informal inquiry. The wing commander (WG/CC) also directed the public affairs to issue an unsolicited press release supporting the applicant's relief.

DAFI 36-2406, *Officer and Enlisted Evaluations Systems*, states the Airmen Comprehensive Assessment, will not be completed during the initial feedback. The reason being that the rater would not have had sufficient time to observe and assess the ratee's performance. However, the SFG/CC did complete and include the assessment he did not meet standards based on the DEOCS report alone. AFI 36-2406 also requires raters to ensure derogatory information relating to unsatisfactory behavior or misconduct is reliable and supported by a preponderance of the evidence. A review of the facts clearly demonstrate a lack of evidence to support the conclusion that he promoted, created or tolerated an unhealthy or hostile command climate.

The DEOCS report was taken by less than 34 percent of the squadron members. The DEOCS report itself states management or disciplinary actions should not be taken based solely on the results of the report. The DEOCS and the inquiry report also contained many positive comments which contradicted justification for his removal.

On 18 Nov 19, he received documents from his Freedom of Information Act (FOIA) request. The email traffic from 13 and 15 Sep 19 outline what appears to be the rationale for his removal, which were the Jul 19 DEOCS report, the 8 Aug 19 initial feedback, the Aug 19 informal inquiry and undocumented feedback from airmen.

A further example of improper punitive documentation is the removal from the SDE memorandum which was included in his officer selection record (OSR). AFI 36-2608 *Military Personnel Records Systems*, specifies which documents can be filed in the OSR and that any documents not listed may not be filed in the OSR. Paragraph 2.2.2.3 does not include notification of removal from DE; therefore, his OSR used in the PO612C CSB was inaccurate and in violation of Air Force policy.

He provides letters of support to include from the former SFG deputy commander (SFG/CD) dated 11 Feb 21, former SFS flight chief dated 23 Apr 22 and the SFG Chief Enlisted Manager (CEM) dated 15 Oct 19.

The applicant's complete submission is at Exhibit A.

## STATEMENT OF FACTS

The applicant is a lieutenant colonel (O-5) in the Air Force.

SAF/IG provides documentation to show on 10 Jul 19, [redacted] filed an IG complaint alleging reprisal by the applicant in violation of 10 U.S.C § 1034. On 20 May 19, the complainant was advised by the SFS/SFM he would be receiving a letter of counseling (LOC) for enlisted performance reports (EPR) being late. The complainant alleged the applicant was looking for any reason to give him paperwork to keep him from getting promoted. The complainant alleged a professional development course was canceled and he was provided performance feedback with areas for improvement just prior to his EPR coming due. The complainant alleged he was not afforded the same opportunities as his peers. The reprisal was in response to the complainant alleging that a captain (O-3) in the SFS slapped his wife in the face when he attended a party at the complainant's home in Dec 18. On 27 Jan 19, the applicant appointed an IO to conduct a CDI into the allegations the captain slapped the complainant's wife. On 26 Feb 19, a CDI was completed and the allegation was not substantiated. The allegations and findings that the applicant reprised against the complainant in violation of 10 U.S.C § 1034 are as follows:

Allegation 1: On or about 2 May 19, the applicant reprised against [redacted] by issuing a LOC after [redacted] made protected communication. **NOT SUBSTANTIATED.**

Allegation 2: On or about 17 May 19, the applicant reprised against [redacted] by canceling a training course after [redacted] made protected communication. **NOT SUBSTANTIATED.**

Allegation 3: In Jun 19, the applicant reprised against [redacted] by planning to issue a poor enlisted performance report (EPR) after [redacted] made protected communication. **NOT SUBSTANTIATED.**

The IO concluded the applicant acted within his respective duty responsibilities as the squadron commander when he took the actions. An acid test for abuse of authority was completed and the IO did not substantiate any abuse of authority for any allegations against the applicant. On 23 Oct

20, the applicant was informed the allegations of reprisal against him were not substantiated. The report of inquiry (ROI) was reviewed by the appointing authority for the major command IG, Investigations and Oversight Division (MAJCOM/IG), the Secretary of the Air Force Complaints Resolution Directorate (SAF/IGQ) and approved by the Department of Defense Inspector General (DOD/IG).

SAF/IG provides the Official Report of Informal Inquiry into Allegations of Hostile Work Environment within the SFS dated 9 Sep 19. On 12 Aug 19, upon review of the DEOCS report dated 15 Jul 19, the SFG/CC appointed the SFG/CD as the IO to conduct an informal inquiry into the reports of a hostile work environment. The IO indicated there were unsubstantiated and invalidated perceptions of fear of retribution; however, there were no specific instances provided that could be proven to be the result of retribution. The perception of a toxic, but not unsafe environment, existed. The perception existed based predominately on miscommunication, lack of communication and misinterpretation both up and down the chain of command. Based on the informal nature of the inquiry, the IO found it most advantageous to allow interviewees to remain anonymous. The IO included in the report the positive and negative comments and noted there were no disciplinary actions taken that would have led any member of the applicant's unit to fear retaliation. The IO concluded the climate was the result of a myriad of factors that culminated and was exacerbated by insufficient communication, as well as borderline insubordinate comments placing blame for the negative impacts of their actions and inactions solely and erroneously on the SQ/CC's directives. The IO's finding was the allegations were substantiated but based predominately on perception versus fact and was not entirely at the fault of the applicant. The IO concluded the SFG/CC should consider giving the applicant an opportunity to course correct his squadron's climate.

The applicant provides Public Affairs (PA) Guidance-Removal of the SFS/CC dated 18 Sep 19. It stated the SFG/CC planned to remove the SFS/CC from command during the week of 23 Sep 19 due to loss of trust and confidence. The decision for removal was based on a recent DEOCS which revealed a deep mistrust between the squadron and the applicant's extreme micromanagement and pervasive perception he did not care for his airmen and their families. It stated an informal inquiry was initiated by the SFG/CC and completed on 9 Sep 19.

A WG/PA news release dated 23 Sep 19 stated the applicant was relieved of command due to a loss of confidence in his ability to maintain a healthy command climate.

On 23 Sep 19, the SFG/CC informed AFPC the applicant was relieved of command for cause. His performance as the SQ/CC had not met the level expected of an officer commensurate with the duty. He was relieved of command for failing to maintain a healthy command climate. The SFG/CC stated he lost confidence in the applicant's ability to command.

The applicant received a referral OPR for the reporting period ending 23 Sep 19. The OPR stated he was relieved of command for failure to maintain a healthy command climate. In his rebuttal response dated 6 Dec 19, the applicant stated the evidence to support the referral OPR included the results of the DEOCS from Jul 19, his initial feedback on 8 Aug 19 and a Sep 19 informal inquiry report and undocumented feedback from airmen. None of the documented data provided justification to support a referral OPR. He stated he treated all airmen with dignity and respect and took appropriate action to correct those who did not.

On 25 Nov 19, the AF/A1 approved the applicant's WG/CC's request to remove the applicant from the SDE. It stated a copy of the letter would be filed in the applicant's OSR. In accordance with AFI 36-2656, *Developmental Education*, the applicant would no longer be eligible for future in-residence DE.

On 7 Jun 21, the applicant was advised his appeal to the evaluation report appeals board (ERAB) that his 23 Sep 19 referral OPR be removed was denied. The applicant noted he did not engage in any misconduct and the sole justification for the referral OPR was the SFG/CC's decision to remove him from command. The ERAB found no evidence the OPR was incorrect or that there was an injustice.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisory at opinions at Exhibits D, E and F.

## **APPLICABLE AUTHORITY/GUIDANCE**

AFI 51-509, *Appointment to and Assumption of Command*, paragraph 14.2. For cause. An officer may be relieved of command for cause, including instances where the superior competent authority has lost confidence in the officer's ability to command due to misconduct, poor judgment, the subordinate's inability to complete assigned duties, the interests of good order and discipline, morale, the good of the organization, or other similar reasons. Paragraph 14.2.1., A superior competent authority's decision to relieve a commander for cause must not be arbitrary and capricious.

Per 10 U.S.C. § 615(a)(3), DoDI 1320.14, *DoD Commissioned Officer Promotion Program Procedures*, and DAFI 36-2501, *Officer Promotions and Selective Continuation*, paragraph A14.2.1. All adverse information an officer receives will be filed in the OSR and be considered by promotion selection, special selection, and selective continuation boards to the grade of O-4 and above (to include processes for O-3 promotions that have "extraordinary adverse information"). Adverse information is any substantiated finding or conclusion from an officially documented investigation or inquiry or any other credible information of an adverse nature. To be adverse, the information must be derogatory, unfavorable or of a nature that reflects unacceptable conduct, integrity or judgement on the part of the individual. Adverse information includes but is not limited to any substantiated finding or conclusion from an investigation or inquiry, regardless of whether command action was taken, court-martial findings of guilt, nonjudicial punishment (NJP) pursuant to Article 15, LOR, letter of admonishment, relief of command for cause, removal from developmental education for cause, and letter of counseling. All adverse information as defined will be permanently placed in the record. Except for set aside of a court-martial or NJP action, removal of adverse information from the records may only be directed by an AFBCMR recommendation.

DAFI 36-2501, *Officer Promotions and Selective Continuation*, paragraph 6.2.1, the AFBCMR or a federal court can direct an officer for consideration by SSB.

The Department of Defense (DOD), Office of People Analytics (OPA), maintains responsibility for the DEOCS. The DEOCS is a congressionally mandated unit level climate survey that provides commanders with unit specific information on critical personnel topics so that they can take immediate steps to improve their climate. It is a tool for commanders and is continuously fielded by units either once a year or when a unit receives a new commander. The results from the DEOCS are reported to the commander and their supervisor to be used to improve conditions in the unit.

DAFI 36-2406, *Officer and Enlisted Evaluations Systems*, paragraph 1.12.4. Derogatory Information and Disciplinary Actions, paragraph 1.12.4.1.1 Conduct based on unreliable information. Raters must ensure that information used to document performance especially derogatory information relating to unsatisfactory behavior or misconduct is reliable and supported by a preponderance of the evidence.

DAFI 36-2670, *Total Force Development*, paragraph 3.3.5.4., When a request from the senior rater, management level or developmental team to remove an officer from a developmental

education designation list for cause is approved by AF/A1, that officer will be permanently removed from the nomination list. These details will be disclosed in the officer's single unit retrievable format (SURF), Duty Qualification History Brief and the Officer Selection Brief. The letter will be filed as a permanent part of the officer's selection record (OSR).

DAFI 36-2608, *Military Personnel Records Systems*, dated 16 Apr 21, Incorporating Change I dated 28 Sep 22, paragraph 2.2. The electronic Officer Selection Record Group (eOSR) includes paragraph 2.2.3.8 (Added) Developmental Education (DE) Removal (for cause).

## **AIR FORCE EVALUATION**

AFPC/DP3SP recommends denial for removal of the referral OPR. The evaluator's referral comment was required as a mandatory consideration in accordance with AFI 36-2406. The comment was based on key findings in the squadron's DEOCS results. The DEOCS is the most accurate way for an evaluator to assess a commander's effectiveness in ensuring a healthy command climate.

The National Defense Authorization Act (NDAA) for fiscal year 2014, Public Law 113-66, Section 1751 requires commanding officers to maintain a healthy organizational climate and requires the tracking and documenting when this is violated. When a healthy climate does not exist, commanders should be relieved of their command. Based on the change in law, DOD codified this in DODI 6400.11 and AFI 36-2406, which states "Commanders at every level have an even greater responsibility to create a healthy climate in their command. Command climate, just like organizational climate is the perception of a unit's environment by its members. Commanders are ultimately responsible for the good order and discipline in their unit and have a unique responsibility and authority to ensure good order and discipline. Therefore, evaluators must take this responsibility and authority into consideration when evaluating a commander's effectiveness in ensuring a healthy command climate."

The applicant filed an application to the ERAB for removal of the referral OPR. The ERAB was not convinced there was an error or injustice and denied his request on 5 Jun 21.

The complete advisory opinion is at Exhibit D.

AFPC/DPMSPP recommends denial for SSB consideration. The applicant must exhaust avenues for removal of the OPR, removal from SDE and redaction of documents related to the removal from command prior to SSB consideration.

The applicant met the CY19D PO619D LAF CSB, CY21C PO621C LAF-A CSB and the CY22B PO622B LAF-A CSBs for promotion to the rank of colonel but was a nonselect within each board. In accordance with DAFI 36-2501, the applicant is not eligible for SSB consideration, as each board has previously considered his record, and there are no current changes to consider.

The complete advisory opinion is at Exhibit E.

AF/JA recommends granting removal of the referral OPR but recommends denial for removal from command and removal from the DE designation memorandums. Based on the evidence and deference to command discretion, AF/JA finds no legal error in the command's decision to remove the applicant from command or to remove him from the DE designation. However, AF/JA finds an error in the referral OPR.

This is not a clear cut case because there is not clear evidence on either side. As for evidence to support the commander's decisions, the documents are not robust. The only objective evidence is the IO's report. The applicant provided letters of support; however, they are considered one-sided

and not subject to cross-examination, and hence not objective, although they have some persuasive value.

AF/JA disagrees with the allegation the applicant's commander removed the applicant from command without sufficient supporting evidence, in violation of AFI 51-509. In the commander's removal from command letter, he stated he lost confidence in the applicant's ability to command. Paragraph 14.2 of AFI 51-509 states that a decision to relieve an officer from command includes instances where the superior competent authority has lost confidence in the officer's ability to command due to the good of the organization, or other similar reasons. Although the applicant contests the SFG/CC's conclusion he failed to maintain a healthy command climate, the SFG/CC's loss of confidence does not have to be the applicant's misconduct. Rather, the loss of confidence can be for the good of the organization, which in this case may have been necessary because of the strongly negative DEOCS Report. Regardless of the applicant's culpability in creating the unhealthy command climate, the fact remains as the SQ/CC he failed to create a healthy one. Even the informal inquiry IO concluded the applicant's relationships with some subordinates were beyond repair, stating "the loss of confidence may render the SQ/CC beyond the point of no return." To find a legal error is a high bar to overcome and wide discretion is given to the commander in the very paragraph the applicant cites. Similar command deference regarding the SFG/CC's decision is given for the removal from the DE program.

AF/JA agrees with the applicant there was an error in the referral OPR. The applicant's challenge of the commander's conclusion he failed to maintain a healthy command climate is relevant. In the referral OPR, the SFG/CC stated the applicant was relieved of command for failing to maintain a healthy command climate. Based on the IO's report, AF/JA finds a lack of evidence to support the conclusion the applicant should receive a negative evaluation for the command climate. The IO reported that a toxic command climate was already brewing before the applicant took command and that certain SNCOs may have been perpetuating that toxic climate because of personal agendas against the applicant. As stated, relief from command may result from no misconduct or culpability. Hence, AF/JA does not find the references for relief from command as sufficient evidence to support the findings.

The complete advisory opinion is at Exhibit F.

## **APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 2 Mar 23 for comment (Exhibit G) but has received no response.

## **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. The Board concurs with the rationale and recommendation of AF/JA and finds a preponderance of the evidence substantiates the applicant's contentions in part. Specifically, the applicant has provided sufficient evidence to conclude he should not have received a negative OPR for command climate, which is sufficient to justify granting the applicant's request for removal of the referral OPR. However, for the remainder of the applicant's request, the evidence presented did not demonstrate an error or injustice, and the Board therefore finds no basis to recommend granting that portion of the applicant's request. In this respect, the Board notes AFI 51-509 and DAFI 36-2670 provide commander's latitude and deference to remove officers from command

and DE designation for loss of confidence, leadership or for good of the organization. Accordingly, the Board finds the applicant has not sustained his burden of proof to warrant removal of the relief of command and removal from DE. Upon the applicant's correction of his record for removal of the referral OPR, he may request SSB consideration in accordance with DAFI 36-2501. Therefore, 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 his AF Form 707, *Officer Performance Report (Lt thru Col)*, for the reporting period of 3 Jun 19 to 23 Sep 19 be void and removed from his 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."

However, regarding the remainder of the applicant's request, the Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the application will only be reconsidered upon receipt of relevant evidence not already considered by the Board.

## **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-2022-01603 in Executive Session on 22 Mar 23 and 3 Apr 23:

, 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 2 Jun 22.  
Exhibit B: Documentary evidence, including relevant excerpts from official records.  
Exhibit C: Report of Informal Inquiry, dated 9 Sep 19. (WITHDRAWN).  
Exhibit D: Advisory opinion, AFPC/DP3SP, dated 30 Dec 22.  
Exhibit E: Advisory opinion, AFPC/DPMSPP, dated 31 Jan 23.  
Exhibit F: Advisory opinion, AFPC/JA, dated 3 Feb 23.  
Exhibit G: Notification of advisory, SAF/MRBC to applicant, dated 2 Mar 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.