

RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXXXXXX

DOCKET NUMBER: BC-2022-01783

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His letter of reprimand (LOR) dated 2 Mar 14 be removed from his records.
2. His referral officer performance report (OPR) for the reporting period ending 22 Oct 13 be removed from his records.

APPLICANT'S CONTENTIONS

The LOR was not accomplished and finalized in accordance with AFI 36-2907, *Adverse Administrative Actions*, as the second endorsement detailing the final determination was not completed. His response to the LOR dated 6 Mar 14 was also never attached or uploaded in his records. The missing rebuttal was discovered and uploaded by the Inspector General (IG) this past year. The LOR resulted in unfair prejudice against him and all documents resulting from it should be removed from his records. If the Board determines the LOR should be removed, he also requests removal of his referral OPR.

He provides an undated letter of support. It states he was the applicant's direct report at the time of the LOR. He disagreed with the referral OPR; however, as the LOR was written by the Joint Forces Headquarters Commander, he was unable to affect the decision. The LOR was politically driven and the actions taken against him were needed to maintain good relations and access. The applicant was put under investigation for what was a standard practice regarding travel plan variations. Unfortunately, he was singled out to make an example of in order to end the widespread activity. The applicant was not provided the 30 day timeframe to respond to the LOR. Further, the date he signed and acknowledged the OPR do not coincide with required timeframes to submit a rebuttal. The OPR comments state the additional reviewer considered his rebuttal dated 2 Mar 14, which is proof his rebuttal was received; however, it is not documented anywhere.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a lieutenant colonel (O-5) in the Air National Guard (ANG).

According to a Report of Investigation (ROI) signed by the State ANG Director of Operations, provided by SAF/IG, reflects there were several accusations against the applicant while he was stationed at the Security Cooperation Office in Trinidad and Tobago. The ROI includes the following allegations:

Allegation 1: The applicant oppressed [redacted], a person subject to his orders by refusing to submit an end of tour award, submitting a negative OPR and made public personal attacks against him. **(UNSUBSTANTIATED)**.

Allegation 2: The applicant on 15 Aug 13, with intent to deceive, submitted a false official record, a fitness assessment (FA) scoresheet. The FA was self-scored and not administered in accordance with AFI 36-2905, *Fitness Program*. (**UNSUBSTANTIATED**).

Allegation 3: The applicant on 15 Sep 13, submitted a voucher for payment in the amount of \$2,316.94 for temporary duty (TDY) travel. The original authorization was submitted for the purpose of a conference attendance, which purpose was later altered as a site visit and to take the FA without proper approval, and which he did not attend for either purposes. The claim was fraudulent and known by the applicant to be fraudulent. (**UNSUBSTANTIATED**).

Allegation 4: The applicant on 14 Aug 13, with intent to deceive, signed and submitted an official record, a leave request authorization form with a leave start date of 29 Aug 13, which request was false and known by the applicant to be false. The applicant did in fact submit a leave start date of 29 Aug 13, when in fact it should have been 28 Aug 13. (**SUBSTANTIATED**).

Allegation 5: The applicant on or about 26 Aug 13, without authority, absented himself from his place of duty at which he was required to be and remained absent until on or about 29 Aug 13. The applicant indeed traveled from his place of duty to Miami, FL on 26 Aug 13. He performed some official duties on 27 Aug 13. He departed on 28 Aug 13 as stated on his revised AF Form 988, *Leave Authorization Request*. However, he was negligent in filing his initial AF Form 988 stating his first day of leave. Although the initial leave form was incorrect, the applicant rectified the situation by adjusting his leave in accordance with AFI 36-3003, *Military Leave Programs*. (**SUBSTANTIATED**).

Allegation 6: The applicant, who knew of his duties to attend the Southern Command (SOUTHCOM) conference or site visit and take his FA from 26 Aug 13 to 28 Aug 13 was derelict in the performance of those duties in that he willfully failed to attend or participate, as it was his duty to do. The applicant did in fact travel to SOUTHCOM and tried to perform the duties as listed on his TDY order. However, he was derelict in his duties when he failed to obtain approval/permission for the change of itinerary. The applicant was further derelict in his duties when he improperly filled out the leave request form and failed to correct the date upon signing in on or about 16 Sep 13. Finally, he was derelict in his duties during the investigation. (**SUBSTANTIATED**).

On 2 Mar 14, the applicant received a LOR for dereliction of duty. An investigation disclosed on or about 28 Jul 13 at the Republic of Trinidad and Tobago, he was derelict in the performance of his duty and submitted a fraudulent claim against the Air Force for payment of TDY travel in the amount of \$2,316.94. The original authorized purpose of his TDY travel order was for him to attend a job related conference. However, he altered the purpose of his travel orders, without proper authorization, to reflect a site visit and a FA. In reality, he did not attend the conference, conduct a site visit nor complete a FA.

On 2 Mar 14, the applicant acknowledged receipt of the LOR and indicated he understood he had until 6 Mar 14 to provide a response. The applicant's automated records management system (ARMS) record includes the LOR and an unsigned response to the LOR dated 6 Mar 14. He stated he was not derelict in the performance of his duties and was never ordered to attend the conference. As the acting military liaison office commander, he had the authority to use unit funds to travel to SOUTHCOM to accomplish routine business. He was unfairly targeted by [redacted] and SOUTHCOM. He indicated he intended to file an IG and a Congressional complaint. The response states the original wet signed document was turned into the Assistant Adjutant General for **Air** on 6 Mar 14. The LOR does not include the Assistant Adjutant General's second endorsement indicating the rebuttal response was reviewed and whether the LOR would be upheld. SAF/IG did not have a record of an IG complaint submitted by the applicant, nor did the applicant provide evidence of an IG complaint.

The applicant received a referral OPR for the reporting period ending 22 Oct 13. The OPR stated he had a first lapse of judgment in his career. His otherwise stellar assignment was overshadowed by questionable travel which resulted in an LOR. The additional rater, the Assistant Adjutant General for Air, noted the applicant's response to the referral memorandum was reviewed; however, his ARMS record does not include a referral memorandum or any response from the applicant.

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

APPLICABLE AUTHORITY/GUIDANCE

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 36-2406, *Officer and Enlisted Evaluation Systems*, paragraph 1.10.2.2, Any evaluator whose ratings or comments causes an evaluation to become a referral evaluation must give the ratee the opportunity to comment on the evaluation. Paragraph 1.10.2.9., All original documents will remain attached to the original evaluation.

AIR FORCE EVALUATION

State ANG Attorney-Advisor recommends removing the LOR and referral OPR from the applicant's records. The persons involved in the LOR process have all retired or passed away. There is no one with sufficient knowledge of the case to issue the LOR again. The nine year delay in the process could also be argued to be prejudicial to the applicant's ability to gather evidence to rebut a new LOR. The cleanest option is to recognize because the second endorsement of the LOR was not completed, there is not a final agency action and statements indicating the LOR was finalized are factually and procedurally incorrect.

In 2014, the applicant was a traditional drill status guardsmen. As such, AFI 36-2907 in effect at the time, required members be given 30 days to respond. It appears that in contravention of the AFI, the applicant was only given three days to respond to the LOR. The applicant responded on 6 Mar 14. Inexplicably, his response to the LOR was not included in his records. There is no evidence the response was ever reviewed and the second endorsement was never completed. It would appear at the moment, the LOR is still pending, awaiting final agency action.

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 31 May 23 for comment (Exhibit D) 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 the State ANG Attorney-Advisor and finds a preponderance of the evidence substantiates the applicant's contentions. Based on the evidence, it appears the LOR and referral OPR were not accomplished and finalized as required. The applicant was denied due process when his chain of command failed to provide him with the opportunity to provide a rebuttal response or by not considering his rebuttal response to the LOR and referral OPR. Therefore, in the interest of justice, 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:

- a. His letter of reprimand (LOR) dated 2 Mar 14 be voided and removed from his records.
- b. AF Form 707, *Officer Performance Report*, for the reporting period of 23 Oct 12 thru 22 Oct 13 be voided 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."

CERTIFICATION

The following quorum of the Board, as defined in 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-2022-01783 in Executive Session on 21 Jun 23 and 3 Jul 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 14 Sep 22.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: SAF/IG ROI, undated. (WITHDRAWN).
Exhibit D: Advisory opinion, Attorney-Advisory, dated 9 Jan 23.
Exhibit E: Notification of advisory, SAF/MRBC to applicant, dated 31 May 23.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.