

## ADDENDUM TO RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

XXXXXXXXXXXXXXXXXX

**DOCKET NUMBER:** BC-2022-01934-2

**COUNSEL:** NONE

**HEARING REQUESTED:** YES

### APPLICANT'S REQUEST

The Board reconsider his request for the following:

1. His letter of reprimand (LOR), dated 16 Dec 20 be removed from his record.
2. The three "Substantiated" allegations in the commander directed investigation (CDI) report of investigation (ROI) dated 7 Dec 20 be changed to "Not Substantiated."

### RESUME OF THE CASE

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

On 11 Oct 22, the Board considered and denied his request for removal of the LOR dated 16 Dec 20 and the substantiated allegations in the 7 Dec 20 CDI ROI be changed to reflect the allegations were not substantiated. The applicant asserted he did not violate the isolation order due to his positive COVID-19 test result since he was not given an order to isolate. The Board noted that while the applicant's DD Form 689, *Individual Sick Slip*, did not include the dates of the quarantine period, the Board found the preponderance of the evidence substantiated the applicant was properly made aware of the required 10 day isolation period and would have reasonably known of his obligation to isolate for 10 days following his positive COVID-19 test result. The Board conducted an independent review of the CDI ROI dated 7 Dec 20 and found no error the IO improperly substantiated the allegations he visited a public swimming pool three days following his positive COVID-19 test result. The applicant also requested the Board obtain additional advisories; however, the Board found no reason to obtain additional advisories and concurred with the rationale and recommendations of AFPC/DP2SSM and DAF/JA.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letter and Record of Proceedings at Exhibit H.

On 20 Dec 22, the applicant requested reconsideration of his request. He provides new evidence to show his command's use of the incorrect standard for calculating any isolation period that may have applied on 23 Oct 20. The redacted DA Form 2823, *Sworn Statement*, dated 23 Mar 22 shows [redacted] was advised the base Health Information Portability Accountability Act (HIPAA) office was investigating a HIPAA concern alleging the impermissible disclosure of the applicant's COVID-19 test result and asked if [redacted] had disclosed the applicant's COVID-19 test result to the IO and anyone else and was requested to provide emails. In the response, [redacted] indicated they provided the IO the information and due to the Public Health Emergency Declaration the information was reportable to the applicant's chain of command. The attached email shows the information was requested by and provided to the vice and deputy commander for the air base wing (ABW). This shows the IO only requested proof from the AHLTA computer

system that he had taken a COVID-19 test and that it was a positive test result. The IO did not request proof of his 10 day isolation clock because he did not intend to calculate one. The IO believed the isolation period began on the date of testing. The Board has no evidence of what the 10-day isolation period was that applied to him. Simply establishing he tested positive for COVID-19 on 20 Oct 20 does not tell his command what his isolation timeframe was because the onset of symptoms, not the positive test, starts the 10 day isolation clock according to the 11 Jul 20 policy memorandum in effect at the time he was at the pool. He requests to be informed of which 10 day isolation timeframe the command found him to have violated before the Board denies his request, even the Board in his initial request ignored the policy guidance stating he would have reasonably known of his obligation to isolate for 10 days following his positive COVID-19 test. The IO and his command applied the wrong standard to his case assuming the isolation clock started on the date of testing. More than two years later, the Board has also applied this standard, which is contrary to the ABW commander's (ABW/CC) policy. He requested the Board obtain an advisory opinion on whether AFI 10-2519 imposed a requirement on the command to issue a notice of isolation to him. This would inform the Board on whether any 10-day isolation period must be calculated and communicated. It is an error to determine his 10-day isolation clock started on the date of testing when doing so is contrary to the ABW/CC policy.

ABW/CC Memorandum dated 11 Jul 20 provided guidance on restriction of movement (ROM). It stated due to the ever changing health conditions there was not a "one size fits all" approach and commanders and equivalent leaders within the ABW would be relied upon to make appropriate risk assessments to determine when ROM is necessary. Item 11, states "Quarantine or isolation orders may also be issued if a member is reasonably believed to have been exposed to or tested positive for COVID-19 regardless of symptoms or travel. Be aware any person subject to ROM quarantine or isolation have the right to contest the reason through the PHEO or RQI Cell."

A second ABW/CC Memorandum dated 11 Jul 20 provided policy guidance for base members returning to work after completing home isolation due to confirmed or presumptive positive COVID-19 infection. One of two methods could be used to release a member from home isolation (1) Non-Test based Criteria included returning to work after no fever for past 72 hours, without fever reducing medication, improvement of respiratory symptoms and at least 10 days passed since symptoms first appeared. (2) Test Based Criteria: No fever, improvement of respiratory conditions and confirmed result of two consecutive negative tests, 24 hours apart. After meeting isolation release criteria, the member would contact their unit commander and notify them that they meet isolation release criteria.

On 19 Oct 20, the applicant reported to the military treatment facility (MTF) for a COVID-19 test.

On 20 Oct 20, the applicant was notified of his positive COVID-19 test result. The Chronological Record of Medical Care, dated 20 Oct 20 reflects the applicant was instructed to remain under home quarantine until 24 hours passed since symptoms resolved and at least 10 days since the onset of symptoms.

On 23 Oct 20, the applicant was seen at the base public swimming pool by the officer in charge (OIC) of the COVID-19 Testing Site who reported to his chain of command he was seen at the public pool.

The CDI dated 7 Dec 20 substantiated three allegations the applicant failed to self-isolate as directed. On 23 Oct 20, three days after his positive COVID-19 test, he was seen at the base public swimming pool.

On 16 Dec 20, the applicant received an LOR for the substantiated allegations in the CDI he failed to isolate after receiving positive COVID-19 test results. The LOR was filed in the applicant's officer selection record (OSR). In his response to the LOR dated 20 Dec 20, he stated he was sorry

for going to the pool and should have known better. He also acknowledged he potentially exposed others, it was a bad call and he did not know why he did something so stupid. He also stated he should have sought clarification on how the isolation guidance applied.

The applicant received a referral OPR for the reporting period ending 28 Jan 21. The OPR stated he was removed from duty, failed to isolate after receiving positive COVID-19 test result as required and received an LOR. The ABW/CC reviewed the applicant's comments and concurred with the rater's comments and the referral OPR.

## **APPLICABLE AUTHORITY/GUIDANCE**

DAFI 36-2603, *Air Force Board for Correction of Military Records*, paragraph 2.4, Deciding Cases. The Board normally decides cases on the written evidence contained in the record. It is not an investigative body; therefore, the applicant bears the burden of providing evidence of an error or injustice.

DAFPM 2021-36-03, *Adverse Information for Total Force Officer Selection Boards*, dated 14 Jan 21 and Section 502 of the National Defense Authorization Act (NDAA) for Fiscal Year 2020, signed on 20 Dec 19, as codified in 10 U.S.C. § 615(a)(3) requires all adverse information to be filed in an officer's master personnel records group and officer selection record (OSR) for consideration by promotion boards. The new policy removed the authority for WG/CCs or issuing authorities to direct removal of derogatory data from the OSR effective 1 Mar 20, as previously permissible in AFI 36-2907, *Adverse Administrative Actions*, and AFI 36-2608, *Military Personnel Records*. Adverse information requiring mandatory filing in the OSR and master personnel records group includes but is not limited to LORs and any substantiated adverse finding or conclusion from an investigation or inquiry. Only the AFBCMR may remove the adverse information from the officer's record.

AFI 10-2519, *Public Health Emergencies and Incidents of Public Health Concern*, Paragraph 3.2.10.2, Persons subject to quarantine or isolation shall obey the rules and orders established by the installation commander in consultation with public health. Failure by military members who are subject to quarantine or isolation to obey the rules and orders established by the installation commander, to remain within the quarantine premises; or to refrain from putting themselves in contact with any person not subject to quarantine is a violation of Article 92, UCMJ. Figure A4.1. Template: Notice of Isolation, includes directions and information for conditions for termination of the order, specified duration of isolation, the place or area of isolation and precautions to prevent the spread.

## **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 remains unconvinced the evidence presented demonstrates an error or injustice. The applicant in his response to the LOR acknowledged his decision to visit the public pool a mere three days after testing positive for COVID-19 was wrong but now wishes the Board to remove the substantiated CDI findings and LOR based on the premise he was not given a direct order with specific dates for isolation. The Board finds the applicant, a lieutenant colonel and a judge advocate officer, knowingly failed to isolate as required; however, he did not anticipate being seen and reported by medical personnel. The Board also notes the 11 Jul 20 ABW/CC memorandum states that after meeting isolation release criteria, the member would contact their unit commander and notify them that they met isolation release criteria. In this case, the applicant not only failed to isolate but there is no evidence he obtained a release from

isolation before visiting a public swimming pool. The applicant requests the Board provide him with the isolation period before denying his request; however, per DAFI 36-2603, the AFBCMR is not an investigative body and it is the applicant's burden to sustain the burden of proof. The Board finds the applicant fell short of meeting Air Force and public health standards during a world-wide pandemic when he chose to visit the public pool three days after testing positive for COVID-19. The applicant's argument the CDI findings and LOR should be removed because he was not provided with a written order showing the exact 10-days is without merit. In this respect, the Board finds the evidence is sufficient to conclude the applicant was properly made aware of his requirement to self-isolate for 10-days upon testing positive for COVID-19. Should he have had any questions or disputes with the isolation period, it was his responsibility to obtain additional information or request release. Further, the Board notes military commanders are presumed to act lawfully and in good faith and entitled to substantial deference in the governance of its affairs. There is a presumption of regularity unless the applicant provides evidence to the contrary. In this case, the applicant has failed to substantiate there was an error or injustice. 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-2022-01934-2 in Executive Session on 11 Apr 23:

, Panel Chair  
, Panel Member  
, Panel Member

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

Exhibit H: Record of Proceedings, w/ Exhibits A-G, dated 13 Oct 22.  
Exhibit I: Application, DD Form 149, w/atchs, dated 20 Dec 22.  
Exhibit J: Documentary evidence, including relevant excerpts from official records.

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.