

RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXX

DOCKET NUMBER: BC-2022-01980

COUNSEL: XXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His rescinded Letter of Admonishment (LOA) be removed from both his Officer Selection Brief (OSR) and the Inspector General (IG) database.
2. His 2021 Officer Performance Report (OPR) be included in his OSR.
3. His corrected board package be submitted to meet the supplemental lieutenant colonel (O-5) board which convenes on 26 Sep 22.

APPLICANT'S CONTENTIONS

The governing directive at the time of his LOA issuance, Air Force Instruction (AFI) 36-2907, *Unfavorable Information Files (UIF)*, dated 26 Nov 14, did not require that an LOA be placed in an OSR. The discretion to place a file in the member's OSR was left to the member's commander. His commander did not intend for the LOA to be sent to the Inspector General or placed in his OSR. AFI 36-2907, dated 26 Nov 14 was superseded by Department of the Air Force Instruction (DAFI) 36-2907, *Adverse Administrative Actions*, on 22 May 20. In accordance with DAFI 36-2907, para 2.4.6.4, after the disposition date of the record (in either Personnel Information File (PIF) or Unfavorable Information File (UIF)) has passed, members may apply to the Air Force Board for Correction of Military records.

During a flight, he received an inappropriate cartoon drawing that was sent to his computer screen by crewmember, and instead of immediately addressing it, he let out an uncomfortable laugh. Another crewmember felt that the cartoon was offensive and reported it. The squadron commander then issued an LOA to all involved. Knowing that this conduct was not indicative of his character or professionalism as an officer and aviator, and using his command discretion, his commander directed that this LOA not be recorded in his OSR, Control Roster, or to start an UIF. In fact, as it was explained to him, it would only be placed in his PIF.

However, unbeknownst to his commander and him, the LOA was submitted to the Inspector General's office by the temporary squadron first sergeant. So, six (6) months later when his commander decided to rescind the LOA and remove it from his PIF, neither he nor his commander knew to purge it from the IG tracking system. He was never notified, or aware, that the LOA would exist in any type of record by his command team.

In accordance with (IAW) AFI 36-2907, dated 26 Nov 14, this LOA should have never been sent to the IG or placed in his OSR as that was at the discretion of the commander. In addition, IAW AFI 36-2907, dated 26 Nov 14, that if made aware the LOA was submitted to the IG and OSR then an opportunity was available for removal which he was not offered.

In the two (2) years leading up to the P0522B LAF-A lieutenant colonel (O-5) Board, he was selected for positions at the wing level that normally are filled by lieutenant colonels. During

this time frame, he continuously reviewed his records to ensure that everything was current as his Performance Recommendation Form (PRF) was being prepared. Additionally, despite his due diligence, his 2021 OPR which closed out on 6 Feb 22 was not signed by his wing commander until 9 Mar 22, which was nine (9) days after the promotion board convened.

In conclusion, since he received the LOA he has reviewed his files on the Personnel Records Display Application (PRDA) and saw no adverse paperwork, to include the LOA. So, at no point was he given notice that the LOA would be in his record for him to either correct or to write a letter to the board to explain the circumstances. It wasn't until after he was notified of his non-selection for lieutenant colonel that, upon another review of his PRDA, he discovered both the existence of the LOA and the omission of his 2021 OPR.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is an Air Force major (O-4).

On 5 Mar 20, an LOA indicates that his commander admonished him for an event which occurred on 27 Feb 20 when he unprofessionally solicited and encouraged an enlisted aircrew member to send, via data forwards on the aircraft, an inappropriate image and texts to himself and other crewmembers and that the viewing of the image only stopped when another aircrew member confronted him about the inappropriate nature of the image and texts.

On 5 Mar 20, the applicant acknowledged receipt of the LOA and understood that he has three (3) workdays to present any information for consideration and inclusion in this action. He also understood that the commander has three (3) duty days to advise of his final decision regarding any submitted comments. On that same day, the applicant's commander indicated that the applicant elected not to respond when the LOA was administered and decided that the LOA will remain in effect and be filed in the applicant's UIF.

On 11 Jan 22, according to documentation provided by the applicant, his AF Form 709, *Promotion Recommendation*, was signed by his wing commander (senior rater).

On 28 Feb 22, the applicant and his wing commander (senior rater) signed his OPR for the period of report, 6 Feb 21 – 5 Feb 22.

On 1 Mar 22, according to the myPers Screenshot, *Status of lists pending Senate confirmation (or recently confirmed)*, P0522B Lt Col LAF-A/F/I/NX convened.

On 14 Nov 22, in response to an AFBCMR request for an advisory on this case, SAF/IGQ advised that they do not maintain any IG information on the applicant and therefore are unable to provide an advisory.

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

APPLICABLE AUTHORITY/GUIDANCE

On 26 February 2021, the Secretary of the Air Force ordered a policy change via a Department of the Air Force Policy Memorandum (DAFPM) 2021-36-03 on Adverse Information for Total Force Officer Selection Boards to comply with Section 502 of the National Defense

Authorization Act (NDAA) for Fiscal Year 2020, signed on 20 December 2019, as codified in title 10 United States Code, section 615(a)(3).

The new law, DoD policy, and subsequent Air Force policy require all adverse information to be filed in the officer's master personnel records group and Officer's Selection Record for consideration by both regular and reserve promotion selection, special selection, federal recognition, and selective continuation boards to the grade of O-4 and above, to include promotion processes to the grade of O-3 that involve adverse information that received significant media attention or is of interest to the Senate Armed Services Committee. These changes came into effect for all promotion boards convening on or after 1 Mar 2020 and include historic adverse information previously issued on or after 1 Jan 12 and Article 15s and approved court martial findings dated prior to 1 Jan 12. It further removed the authority for Wing commanders, delta commanders, or issuing authorities to direct removal of derogatory data from the OSR as previously permissible in AFI 36-2907, Adverse Administrative Actions, paragraph 3.4.3.1, and AFI 36-2608, Military Personnel Records, paragraphs 7.10 through 7.12 (and their subparagraphs), 8.3.8, and 8.3.15 (and its subparagraphs). Adverse information that requires mandatory filing in the Officer Selection Record (OSR) and the Master Personnel Records Group (MPerRGp) includes, but is not limited to:

1. Any substantiated adverse findings or conclusions from an officially documented investigation or inquiry, regardless of whether command action was taken as a result.
2. Approved court-martial findings of guilt (Court-martial Orders).
3. Non-judicial punishment pursuant to Article 15, Uniform Code of Military Justice.
4. Letters of Reprimand.
5. Letters of Admonishment.
6. Notices of Relief of Command (for cause).
7. Letters of Counseling related to a substantiated adverse finding or conclusion from an officially documented investigation or inquiry.

LOCs unrelated to a substantiated finding or conclusion from an officially documented investigation or inquiry will not be considered adverse information. This preserves commanders' ability to administratively document and rehabilitate minor instances of substandard behavior or misconduct without making it a part of the permanent record (also referred to as "standalone" LOCs).

Moreover, the DAFPM states that "waivers to this policy are not permitted" and all adverse information as defined by the policy will be permanently placed in the MPerRGp. Except for the set aside of a court-martial or nonjudicial punishment action, removal of adverse information from the MPerRGp may only be directed pursuant to an Air Force Board for Correction of Military Records (AFBCMR) recommendation.

As such the AFBCMR is now the sole removal authority for adverse actions. This is not a different type of review for the AFBCMR. Rather, it falls under the Board's existing review authority for corrections resulting from error or injustice.

AFI 36-2406, *Officer and Enlisted Evaluation System*, 14 Nov 19, Paragraph 1.4, *Preparing and Processing Evaluation*, OPRs are due to the military personnel flight (MPF) no later than 30 calendar days after close-out and will be filed in the Automated Records Management Systems/Personnel Records Display Application (ARMS/PRDA) no later than 60 calendar days after close-out. Finally, in accordance with paragraph 1.4.3, an evaluation becomes a matter of record once they are uploaded into ARMS/PRDA. This is further codified by paragraph 3.9.8, *Routing Evaluations*, which states that performance evaluations are due to the servicing MPF or personnel activity 30 days after close-out, and to the office of record 60 days after close-out.

Paragraph 3.6. Annual Reports. Officer's reports will close-out one year from the close-out date of the last evaluation.

AFI 36-2504, *Officer Promotion, Continuation and Selective Early Removal in the Reserve of the Air Force.*, paragraph 1.7 requires officers to monitor their own eligibility for promotion and to ensure that their OSR is correct and up-to-date prior to the convening of the board and Department of Defense Instruction (DoDI) 1320.11, *Special Selection Boards*, paragraph 3b, states that an SSB must not, pursuant to 10 USC 628 (b) or 10 USC 14502 (b), consider any person who by maintaining reasonably careful records may have discovered and taken steps to correct an error or omission on which the original board based its decision against promotion.

AIR FORCE EVALUATION

AFPC/DP2SSM recommends denying the applicant's request to remove the LOA from the applicant's military personnel official record (MPerRGp) and OSR. Upon review of the LOA, the applicant elected not to provide a response and his commander marked, "This LOA will remain in effect and be filed in your UIF." In a subsequent memorandum from his commander, dated 30 Jun 22, the commander explains that he chose to maintain the LOA in the applicant's PIF, but did not plan on taking any additional actions, such as to start a UIF or to maintain the LOA in the applicant's OSR. Additionally, his commander states that in the fall/winter of 2020 that he removed the LOA from the applicant's PIF.

The applicant's commander issued a LOA, in accordance with *AFI 36-2907, Adverse Administrative Actions*, dated 7 Sep 18, paragraph 2.1.1. *Standard of Proof*, which states 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.

Paragraph 2.3. *Letters of Admonishment*, states an admonishment is more severe than a Letter of Counseling/Record of Individual Counseling. For officer personnel, if the LOA is not filed in the UIF, it must be filed in the individuals PIF.

Paragraph 2.6. *Rescinding Records of Individual Counseling, Letters of Counseling, Letters of Admonishment, or Letters of Reprimand*, states commanders may rescind LOAs upon his or her own initiative or upon a request from the member if the member is within their command and LOAs may be rescinded only in the rare situation in which new evidence shows, by a preponderance of the evidence, that the member did not commit the act underlying the original administrative action. Paragraph 2.6.1 states that commanders at a higher level in the current chain of command may also rescind LOAs. Paragraph 2.6.3 further states that LOAs no longer contained in a PIF or UIF may not be rescinded by a commander or civilian director. After the disposition date of the record (in either a PIF or UIF) has passed members must apply to the AFBCMR to have the LOA removed from other Air Force records systems.

Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice. His commander issued a LOA based on the preponderance of the evidence and although his commander has subsequently provided a memorandum detailing his intentions regarding the LOA actions, it was not properly rescinded IAW AFI 36-2907. Furthermore, while the applicant contends that the AFI in place at the time of the issuance of the LOA did not require that it be placed in his OSR, subsequent federal law, DoD policy, and Air Force policy require all adverse information to be filed in the officer's master personnel records

group and Officer's Selection Record for consideration by both regular and reserve promotion selection, special selection, federal recognition, and selective continuation boards to the grade of O-4 and above. In accordance with the National Defense Authorization Act (NDAA) for Fiscal Year 2020, signed on 20 December 2019, as codified in title 10 United States Code, section 615(a)(3), the LOA meets the requirements of adverse information.

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 15 Nov 22 for comment (Exhibit D), and the applicant replied on 30 Nov 22. In his response, the applicant contends that the governing AFI and guidance has changed significantly from the time that he was issued the LOA. He was informed the LOA would not have any consequences to his career and that it would only be placed in his PIF. His commander in his memorandum for the Board stated, "I then chose to maintain the LOA's in both members' PIF and do no additional actions (not open UIFs, place the member on a control roster, or maintain <the applicant's> LOA in his OSR." The temporary first sergeant decided to forward it to the Inspector General without the squadron commander's approval.

At the time he was issued the LOA, he was not an expert on AFI-36-2907, nor was he aware of the requirements of DPAM 2021 36-03. The information that he was provided was misleading as he was informed that the LOA would be placed in his PIF without further action. Had he been correctly informed that it would be placed in an UIF and his OSR, he would have responded accordingly and would have had the Area Defense Counsel (ADC) involved.

Additionally, the LOA contains multiple incorrect facts and should be considered a discovery of new evidence to allow his LOA to be rescinded:

1. He never solicited and encouraged an enlisted member to send, via data forward on the aircraft. The text message sent was a question: "Did you send it to anyone else?" This is not an encouraging action. In fact, the offended person immediately discussed the situation with the master sergeant. This discredits the statement saying he was confronted and is false. He was actually notified five (5) days later by the Director of Operations that there was an issue. During that five (5) day period, she requested Q3's on our flying record through the Operations Group Standardization and Evaluation Section. By engaging with the ADC, he was able to nullify that action however, it was then that his squadron commander was obligated to provide something, which was the LOA. Considering the timeline of events, he was never had the opportunity to prevent the image from being sent further as the offended individual stopped him first.

2. The statement of the LOA "This LOA will remain in effect and filed in your UIF" contradicts the squadron commander's memorandum for the Board and along with the intention to only file in the PIF.

Finally, he has no record or history of unacceptable behavior or actions as his record reflects that this LOA is not linear with his character, professionalism, and officership. He firmly believes he is being punished for a crime uncommitted and is an innocent victim of events.

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 AFPC/DP2SSM and finds a preponderance of the evidence does not substantiate the applicant's contentions. While the applicant contends his LOA should be rescinded, the Board notes the applicant clearly accepted the LOA and elected not to provide a response within the allotted timeframe. As such, the Board finds that the LOA was within the commander's authority and the evidence presented does not demonstrate an error or injustice warranting removal or show it was unjust or inaccurate as written. While the applicant's commander indicated he removed the LOA during the fall/winter of 2020, we note by congressional mandate it is required by the military to furnish adverse information to selection boards considering active duty officers for promotion to O-4 and above. The Board further notes, that while the applicant's OPR closed out on 6 Feb 22, prior to the 1 Mar 22 convene date of the P0522B promotion board, the OPR had not yet become an official matter of record. In accordance with AFI 36-2406, since the time for processing the OPR is up to 60 days after close-out there is no evidence of an error or injustice when his OPR was not included with his promotion board package. Further, there is nothing unique to the applicant's circumstances than that of other similarly situated officers who are meeting their promotion board. 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-2022-01980 in Executive Session on 10 Jan 23:

, Panel Chair
, 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 1 Aug 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DP2SSM, dated 25 Oct 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 15 Nov 22.
- Exhibit E: Applicant's Response, dated 30 Nov 22.

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

Board Operations Manager, AFBCMR