

RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXXXX

DOCKET NUMBER: BC-2022-01983

COUNSEL: XXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His Letter of Reprimand (LOR), and all derogatory information, be removed from all Air Force Record systems to include his Officer Selection Record (OSR).

APPLICANT'S CONTENTIONS

This correction should be made because an administrative error, namely, mismanagement of an LOR and possibly Unfavorable Information File (UIF), precluded his opportunity to request rescission of the LOR prior to the disposition date. In addition, a Command Directed Investigation (CDI) that was conducted into the events that led to the LOR were found unsubstantiated and as such he was under the impression that his Section Commander had discarded the LOR. Had a properly administered UIF existed, his supervisor and he should have known, and with his supervisor's support he would have requested it be rescinded due to less severe action being warranted. Due to the administrative error, the LOR was unjustly entered into his OSR.

In a continuation of his contentions, the applicant provides a list of facts and related statements of the events, as he saw they occurred, and which was part of the mismanagement of his LOR.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is an Air Force lieutenant colonel (O-5).

On 28 Apr 18, according to memorandum for record, subject: Command-Directed Investigation (CDI) Approval Letter, provided by the applicant, the AFELM Section Commander, reviewed and approved the CDI Report of Investigation, dated 14 Apr 18, but found it to be unsubstantiated.

On 24 May 18, his annual OPR for the evaluation rating period of 25 May 17 – 24 May 18 closed-out. His OPR was signed by his commander on 5 Jun 18 and indicates that he met standards for the period of report.

On 29 May 18, the applicant's commander issued the applicant a LOR for wrongfully having intercourse with a woman not his wife.

On 1 Jun 18, the applicant provided his response to the LOR.

On 4 Jun 18, the applicant's commander considered the applicant's response and decided to file the LOR in the applicant's appropriate files and recommended that a UIF be established.

On 5 Jun 18, the acknowledged receipt and understanding of the commander's decision.

On 19 Sep 22, a review of the applicant's RAWS SURF reflects "UIF Code/Date" <blank>.

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 Feb 21, 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 Dec 19, 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 OSR 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 20 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 OSR and the 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.

Air Force Instruction (AFI) 36-2907, *Unfavorable Information File*, dated 26 Nov 14, paragraph 4.4. LORs. A reprimand is more severe than a counseling or admonition and indicates a stronger degree of official censure. Commanders may elect to file a LOR in an UIF for enlisted personnel. LORs are mandatory for file in the UIF for officer personnel.

AFI 36-2406, *Officer and Enlisted Evaluation Systems*, 8 Nov 16, paragraph 1.12.3. Performance Outside the Reporting Period. Duty History or Performance Outside the Current Reporting Period. Do not comment on duty history or performance outside the current reporting period, except as permitted by paragraphs 1.12.3.4.

1.12.3.4. Prior Events. Do not include comments regarding events which occurred in a previous reporting period, unless the events add significantly to the evaluation, were not known to and considered by the previous evaluators, and were not previously reflected in an evaluation which is a part of the permanent record (this includes EPRs, OPRs, LOEs and TRs). EXAMPLE: An event (positive or negative) which came to light *after* an evaluation became a matter of record, but which occurred *during* the period of that evaluation, could be mentioned in the ratee's *next* evaluation because the incident was not previously reported.

AIR FORCE EVALUATION

AFPC/DP2SSM recommends denying the applicant's request to remove his LOR and all derogatory information from all Air Force record systems to include his OSR. The applicant's LOR, dated 29 May 18, is in his official military personnel record. Upon review, the applicant had three (3) duty days from the date they received their LOR to provide a response, which he did on 1 Jun 18. The applicant's LOR meets the requirements of adverse information in accordance with Title 10, United States Code Section 615(a)(3). Although the applicant believes the adverse information is incorrect, based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice.

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 26 Aug 22 for comment (Exhibit D), and the applicant replied on 31 Aug 22. In his response, the applicant contended that AFPC/DP2SSM should have recommended his request be *granted* due to the injustice which occurred because the responsible organization "failed to create a UIF and file the LOR in it as required by the AFI". Further, AFPC/DP2SSM should have affirmed the evidence provided in his application which shows the UIF did not exist. Additionally, AFPC/DP2SSM ignored his claim and supporting evidence. Specifically, the applicant did not claim:

- The injustice occurred when the commander issued the LOR.
- His decision was not based upon the preponderance of evidence.
- The adverse actions was inaccurate.

Instead the applicant reiterates his claim that the reason his case should be granted is due to the administrative handling of his LOR/UIF in accordance with the AFI.

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 that due to administrative error the LOR was unjustly entered into his OSR and precluded his opportunity to request rescission of the LOR prior to the disposition date, and that he was under the impression that his Section Commander had discarded the LOR, the Board notes that the applicant clearly acknowledged receipt and understanding that the LOR will be maintained in the applicant's appropriate records and an UIF will be established. Additionally, the Congressional-mandate requires the military to furnish adverse information to selection boards considering active duty officers for promotion to O-4 and above. As such, the Board finds that the LOR was within the commander's authority and the evidence presented does not demonstrate an error or injustice warranting removal of the LOR or show it was unjust or inaccurate as written. Furthermore, the applicant's circumstances are not unique compared to other similarly situated officers. Therefore, the Board recommends against correcting the applicant's records.

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-2022-01983 in Executive Session on 8 Nov 22:

, 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 2 Aug 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DP2SSM, dated 19 Aug 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 26 Aug 22.
- Exhibit E: Applicant's Response, dated 31 Aug 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