

**UNITED STATES AIR FORCE  
BOARD FOR CORRECTION OF MILITARY RECORDS**

Work-Product

**RECORD OF PROCEEDINGS****IN THE MATTER OF:**

Work-Product

**DOCKET NUMBER:** BC-2022-02221**COUNSEL:** Work-Product**HEARING REQUESTED:** NO

Work-Product

**APPLICANT'S REQUEST**

His nonjudicial punishment (NJP) under Article 15, Uniform Code of Military Justice (UCMJ) be expunged from his record, to include his Officer Selection Brief (OSR) and Master Personnel Record Group (MPerRGp).

Applicant has amended his request, see Exhibit E, that his NJP be removed from his OSR and only his OSR.

**APPLICANT'S CONTENTIONS**

The Article 15, dated 5 Jan [Wor...] in his OSR, in accordance with Department of the Air Force Instruction (DAFI) 36-2907 and DAFI 36-2501, is not only beyond the 10 year requirement for retention but it also does not meet the exception to be retained. Additionally, it should be removed as the Article 15 was issued while he was a company grade officer (CGO) and, he has since been promoted to a field grade officer and has no additional adverse actions against him.

The applicant's complete submission is at Exhibit A.

**STATEMENT OF FACTS**

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

On 16 Dec [Wor...] the applicant was notified of his commander's intent to recommend that the Commander, 18<sup>th</sup> Air Force (18 AF/CC) impose NJP on him pursuant to Article 15, for two specifications of "Failure to obey order or regulation" in violation of Article 92, UCMJ:

- On divers occasions between on or about 13 Jan [Wor...] and on or about 10 Oct [Wor...] he was derelict in the performance of his duties that he willfully failed to refrain from claiming reimbursements for taxis he did not actually take.
- On divers occasions between on or about 6 Feb [Wor...] and on or about 10 Oct [Wor...] he was derelict in the performance of his duties that he negligently failed to refrain from claiming taxi expenses for which he was not authorized.

On 21 Dec [Wor...] the applicant waived his right to court-martial, and indicated that he consulted an attorney and provided a written presentation to the NJP.

On 5 Jan [Wor...] the 18AF/CC finalized his decision and found that the applicant had committed one or more of the offenses alleged and that he will consider placing this record of NJP in the

applicant's OSR or forwarding to a senior review authority who will make the final decision. For these violations, the 18AF/CC imposed the punishment of a reprimand and forfeiture of \$2,174.00 pay per month for two months.

On 31 Jan [Work], the applicant appealed the 18AF/CC's decision to impose NJP.

On 4 Feb [Work], the 18AF/CC denied the applicant's appeal and determined that the NJP action will be filed in the applicant's OSR.

On 5 Mar [Work], the appellate authority, Vice Commander, Air Mobility Command (AMC/CV) granted the applicant's appeal in part, and found the applicant committed only one of the offenses in violation of Article 92, UCMJ. Specifically, he negligently failed to refrain from claiming tax expenses for which he was not authorized and reduced the punishment of forfeiture to \$1,000.00.

On 30 Mar [Work] the General Court Martial Convening Authority Staff Judge Advocate found the record to be legally sufficient.

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

## **APPLICABLE AUTHORITY/GUIDANCE**

Department of the Air Force Instruction 36-2907, *Adverse Administrative Actions*, 14 Oct 22:

1.2. Adverse Information for Total Force Officer Selection Boards Overview. All adverse information an officer receives will be filed in the OSR and will be considered by promotion selection, special selection, federal recognition (ANG specific), and selective continuation boards to the grade of O-4 and above (to include processes for O-3 promotions that have "extraordinary adverse information" per Department of Defense Instruction (DoDI) 1320.14, *DoD Commissioned Officer Promotion Program Procedures*).

1.2.4. Approved court-martial findings of guilt are retained in the OSR permanently unless the findings are overturned on appeal or set aside in their entirety, and the member is not subsequently found guilty at a rehearing or new trial. (T-0) If removed from the OSR for this reason, this is not considered adverse information and will not be filed in the MPerRGp. (T-0) All other adverse information filed in the OSR will remain in the OSR.

1.2.4.1. For O-6 and below boards and processes. For ten years, except for substantiated conduct, any single act of which, tried by court-martial, could have resulted in the imposition of a punitive discharge and confinement for more than one year. (T-0) If the exception is met, the adverse information will remain in the OSR. (T-0) Except for the set aside of a court-martial or nonjudicial punishment, earlier removal of adverse information from the OSR may only be directed pursuant to an AFBCMR recommendation.

1.2.8. Historic adverse information issued prior to the date of the implementation of this instruction will be filed in the MPerRGp. Subject to the rules in both paragraphs 1.2.4 and 1.2.5.1, on retention of adverse information in an OSR, select historic adverse information that was issued prior to the date of the implementation of this instruction, will also be filed in the OSR. Historic adverse information, not already contained in the MPerRGp or OSR that must now be filed includes each of the following:

1.2.8.2. Company Grade Officer (CGO) adverse information disposition (reference Attachment 8, Figure A8.2) where the disposition was assessed when the member was a CGO:

1.2.8.2.1. Nonjudicial punishment pursuant to Article 15, UCMJ.

**AIR FORCE EVALUATION**

AF/JA recommends denying the applicant's request to expunge his Article 15 from his official military record, to include his OSR and MPerRGp. On 5 Jan<sup>Wo.</sup>, the 18AF/CC determined that the applicant committed misconduct on divers occasions by claiming taxi expenses for which he was not authorized to receive, in violation of Article 92, Uniform Code of Military Justice (UCMJ). Prior to accepting the NJP, the applicant consulted with an attorney and voluntarily waived his right to be tried by court-martial. After the NJP proceedings, the applicant appealed the punishment; however, the appeal was denied.

The applicant desires to have his NJP removed from his records. Although there were formerly paths for such a removal, recent changes in federal law prevent it without exception. Through the National Defense Authorization Act (NDAA) for FY20, Congress required the military to furnish adverse information to selection boards considering active duty officers for promotion to O-4 and above. On 16 Dec 20, Department of Defense Instruction (DoDI) 1320.14 was issued to implement the Congressionally-mandated change. On 26 Feb 21, the Secretary of the Air Force (SecAF) 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 both the NDAA and the DoDI. The applicant contends that DAFI 36-2907, *Adverse Administrative Actions*, and DAFI 36-2501, *Officer Promotion and Selective Continuation*, limit retention of NJP record beyond 10 years and argues that his NJP occurred while he was a company grade officer and that he has since been promoted to a field grade officer; therefore, it should be removed from his record. However, there is nothing in the cited DAFI's, or in any other rule or policy that allows for exceptions based upon the passage of time or promotion, that supports his argument in contravention of the FY20 NDAA, DoDI 1320.14 or DAFPM 2021-36-03.

DAFPM 2021-36-03 is clear that "waiver to this policy is not permitted." It further states that NJPs, among other adverse information, "will be permanently placed in the Master Personnel Records Group" and that "except for the set-aside of a court-martial or a nonjudicial punishment action, removal of adverse information...may only be directed pursuant to an Air Force Board for Correction of Military Records recommendation."

After careful review, DAF/JA finds that there is no error or injustice in the underlying NJP. The applicant was afforded the right to counsel as well as the right to refuse Article 15 proceedings and demand trial by court-martial. He accepted the Article 15 proceedings. As such, the record contains insufficient evidence or allegation of 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 28 Oct 22 for comment (Exhibit D), and the applicant replied on 10 Feb 23. In his response, the applicant states that he is not claiming injustice in his NJP, nor is he asking for a set-aside of the NJP, he is requesting that the NJP be removed from his OSR, and only his OSR as directed in DAFI 36-2907, paragraph 1.2.4 which states, "All other adverse information filed in the OSR will remain in the OSR." This is followed up by subparagraph 1.2.4.1, "For O-6 and below boards and processes. For ten years, except for substantiated conduct, any single act of which, tried by court-martial, could have resulted in the imposition of a punitive discharge and confinement of more than one year."

The charge of negligence in his NJP was never sufficient, if tried by court-martial, to result “in the imposition of a punitive discharge and confinement of more than one year.” Thus, in accordance with DAFI 36-2907 paragraph 1.2.4.1, his NJP dated 5 Jan [redacted] should have been removed from his OSR on 5 Jan 21.

The retention of his NJP in his OSR was an oversight by AFPC and they stated as much in their correspondence, “The DAF policy dated 26 Feb 21, is that the adverse information will remain in your OSR for 10 years. However, due to it being over 10 years ago that it was input into your record, you will need to complete a BCMR request to have the adverse information removed from your OSR.”

This is the request he is making, this is the guidance that AFPC is operating under, this is what he is expecting the Board to find and enforce.

The applicant’s complete response is at Exhibit E.

### **ADDITIONAL AIR FORC EVALUATION**

AF/JA recommends granting the applicant’s request that his NJP be removed from his OSR and only his OSR. Based on his revised request, they find merit in his claim only as it narrowly pertains to the Officer Selection Record. In accordance with DAFI 36-2608, *Military Personnel Records System*, paragraph 6.9, *When to Remove an NJP from an Officer Selection Record or an Electronic Senior Noncommissioned Officer Selection Record and an eMPerRGp*, the applicant’s 5 Jan 11 NJP was analyzed and the maximum punishment at court-martial for *Dereliction in the performance of duties through neglect or culpable inefficiency* is forfeiture of two-thirds pay per month for 3 months, and confinement for 3 months. This maximum confinement period is under the threshold established by DAFI 36-2608, and the mandatory retention period has lapsed. Therefore, the 5 Jan 11 NJP should no longer be retained in his OSR. However, retention of the applicant’s NJP in other records is mandatory pursuant to federal law.

The complete advisory is at Exhibit F.

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

The Board sent a copy of the advisory opinion to the applicant on 8 Mar 23 for comment (Exhibit G) and on 11 Mar 23 the applicant responded (Exhibit H) and said he did not believe a rebuttal is necessary.

The applicant’s complete response is at Exhibit H.

### **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 Board finds merit in his request to remove his NJP from his OSR as the mandatory retention period has lapsed. 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 as the retention of the applicant's NJP in other records is mandatory pursuant to federal law. Therefore, the Board recommends correcting the applicant's records as indicated below.

**RECOMMENDATION**

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show that AF Form 3070C, *Record of Nonjudicial Punishment*, dated 16 Dec 10, be declared void and removed from his Officer Selection Record and only his Officer Selection Record.

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-2022-02221 in Executive Session on 6 Dec 22 and 7 Nov 23:

- Work-Product** Panel Chair
- Work-Product** Panel Member
- Work-Product** Panel Member

All members voted to correct the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 17 Aug 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, DAF/JA, dated 28 Oct 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 28 Oct 22.
- Exhibit E: Applicant's Response to Advisory, dated 10 Feb 23.
- Exhibit F: Additional Advisory Opinion, AF/JA, provided 6 Mar 23.
- Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 8 Mar 23.
- Exhibit H: Applicant's Response to Advisory, dated 11 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.

3/25/2024

X **Work-Product**

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Board Operations Manager, AFBCMR  
Signed by: **Work-Product**