



CUI//SP-MIL/SP-PRVCY

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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2022-02393

COUNSEL: *Work-Product*

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. His AF Form 707, *Officer Performance Report (OPR) (Lt thru Col)*, for the reporting period 4 Mar 15 through 3 Mar 16 be removed from his record.
2. His AF Form 709, *Promotion Recommendation (PRF)* for Board P0419A be re-accomplished and he receive consideration for promotion by a special selection board (SSB) for Board P0419A.
3. His AF Form 709 for Board P0420A be re-accomplished and he receive consideration for promotion by an SSB for Board P0420A.

APPLICANT'S CONTENTIONS

His OPR for the period 4 Mar 15 through 3 Mar 16 contains two major errors and must be removed from his records as it references a Letter of Reprimand (LOR) he received for making an alleged false official statement. In accordance with Air Force Instruction (AFI) 36-2907, *Unfavorable Information File (UIF) Program*, Chapter 2, Regular Air Force members are permitted three duty days to reply to the LOR and the reply must be considered in the rendering official's final decision to uphold or withdraw the LOR. As noted in the LOR, his response was delivered to the wing commander on 6 Jul 15, the first day he was discharged from an inpatient status. However, the wing commander's decision to uphold the LOR was dated 29 Jun 15, the same day the LOR was administered. Accordingly, as required by AFI 36-2907, the wing commander never considered the response when he made his final decision.

AFI 36-2406, *Officer and Enlisted Evaluation Systems*, Chapter 1, states raters must ensure information used to document performance is reliable. As demonstrated by the glaring error in the administration of the LOR, none of the raters involved in the preparation of the Mar 16 OPR fulfilled this requirement. He prepared and submitted several pages of rebuttal comments for the Mar 16 OPR comments, which also addressed the LOR. However, even though the additional rater's comments included the following statement, "I have carefully considered [Applicant's] comments in the referral memorandum dated 9 Mar 16," the rebuttal comments were not attached to the OPR and were never made part of his Officer Selection Record (OSR) as required by AFI 36-2406.

The PRF for the P0419A promotion board does not contain an explicit reference to either the LOR or the Mar 16 OPR. However, it contains an Overall Recommendation "Do Not Promote" with the statement "...with derogatory information in his record." The Mar 16 OPR is the only derogatory information in his OSR. Therefore, the Mar 16 OPR must be the source of the derogatory information. Thus, if the May 16 OPR is removed, then the P0419A PRF must be

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POC: SAF.MRBC.Workflow@us.af.mil

voided and re-accomplished as it references derogatory information that is no longer in his record and he must be accorded consideration for an SSB.

Additionally, although the P0420A PRF does not contain any reference to the LOR or the Mar 16 OPR, in accordance with AFI 36-2406, Chapter 8, which requires senior raters to consider all information in an officer's OSR when preparing a PRF, this PRF must also be discarded and re-accomplished as it was prepared with consideration of the Mar 16 OPR.

Finally, in accordance with AFI 36-2501, *Officer Promotion and Selective Continuation*, Chapter 6.3, SSB consideration for both the P0419A and P0420A promotion boards are warranted if the Mar 16 OPR and the LOR are removed from his record.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force captain (O-3).

According to the documentation provided by the applicant and analysis of the facts the following information is provided:

On 29 Jun 15, he received an LOR from his wing commander for providing two false official statements to the Investigating Officer for a Command Directed Investigation, in violation of Article 107, Uniform Code of Military Justice.

On 29 Jun 15, (1st indorsement) the applicant acknowledged he had 3 duty days to provide a response.

On 29 Jun 15, (2nd indorsement) the applicant reviewed the allegations and indicated he is submitting the attached response.

On 29 Jun 15, (3rd indorsement) the commander, considering the applicant's response decided the LOR will remain in effect and be filed in the applicant's Unfavorable Information File (UIF).

On 6 Jul 15, the applicant submitted a response to the LOR dated 29 Jun 15.

On 7 Mar 16, AF Form 707, dated 7 Mar 16, Section III, *Performance Factors*, reflects "Does Not Meet Standards." Section XI, *Referral Report*, reflects he acknowledged receipt of a referral report and he may submit rebuttal comments.

According to AF Form 709, provided by the applicant, undated and signed by the wing commander for Board P0419A, he received the promotion recommendation, "Below average officer with derogatory information in his record; not ready to be FGO - do not promote this board," with an Overall Recommendation: Do Not Promote this Board.

According to AF Form 709, provided by the applicant, undated and signed by the wing commander for Board P0420A, he received an Overall Recommendation: Promote.

On 30 Sep 20, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, dated 30 Sep 20, the applicant was honorably discharged with the narrative reason for separation

as “Non-Selection, Permanent Promotion.” He was credited 7 years, 6 months, and 27 days of active service.

For more information, see the excerpt of the applicant’s record at Exhibit B and the advisories at Exhibit C, Exhibit F, and Exhibit G.

APPLICABLE AUTHORITY/GUIDANCE

AFI 36-2907, *Unfavorable Information File (UIF) Program*, 26 Nov 14, paragraph 2.3.4. The RegAF [Regular Air Force] and AFR [Air Force Reserve] individuals on Title 10 status (enlisted and officer) will be allocated 3 duty days (current date plus 3 duty days) to acknowledge the intended actions and provide pertinent information before the commander makes the final decision on placing optional documents in the UIF. In calculating the time to respond, the date of receipt is not counted.

AFI 36-2406, *Officer and Enlisted Evaluation Systems*, Jan 13, Corrective Actions Applied On 5 Apr 13, Incorporating Through Change 3, 30 Nov 15, Chapter 1, *General Considerations*. The Officer and Enlisted Evaluation Systems have varied purposes. The first is to establish performance standards and expectations for ratees, meaningful feedback on how well the ratee is meeting those expectations, and direction on how to better meet those established standards and expectations. The second is to provide a reliable, long-term, cumulative record of performance and promotion potential based on that performance. The third is to provide officer Central Selection Boards, senior NCO evaluation boards, the Weighted Airman Promotion System, and other personnel managers with sound information to assist in identifying the best qualified officers and enlisted personnel for promotion, as well as other personnel management decisions.

AFI 36-2406, paragraph 1.10.2.9, All original documents will remain attached to the original evaluation. (T-1).

AFI 36-2501, *Officer Promotions and Selective Continuation*, 16 Jul 04 (incorporating through Change 3, 17 Aug 09), Chapter 6, *Special Selection Boards (SSB)*, paragraph 6.3. *Conditions that may Warrant an SSB*: 6.3.1, Grant SSBs for promotion to the rank of captain through colonel based on: Legal, Administrative, and Material Errors. Acting on behalf of the Secretary of the Air Force, HQ AFPC/DPPP and HQ AFPC/DPPPO can direct an SSB for an officer if it is determined: The action of the board that considered the officer was contrary to law or involved material error of fact or material administrative error; The board did not consider material information that should have been available in compliance with pertinent Air Force directives and policies, or; An eligible officer did not meet a board or met the board in an incorrect promotion zone or competitive category. Paragraph 6.3.2. *Pursuant to Formal Appeal*. The AFBCMR can grant SSBs when they determine an officer's nonselection for promotion resulted because of an error or injustice in the officer's record. Paragraph 6.3.3. *Exercising Reasonable Diligence*. Do not have an SSB if, by exercising reasonable diligence, the officer should have discovered the error or omission and could have taken corrective action before the originally scheduled board convened.

AIR FORCE EVALUATION

AFPC/DP3SP recommends denying the request. The applicant is requesting his PRFs be removed and re-accomplished as the derogatory information in his 3 Mar 16 OPR was considered when determining the content and recommendation of the PRFs. The applicant received an LOR during the reporting period 4 Mar 15 – 3 Mar 16 for “Intent to deceive, provided two false official statements...,” which resulted in a referral OPR, and processed in accordance with AFI 36-2406,

paragraph, 1.10, *Referral Evaluations*, as comments on performance reports which are derogatory in nature automatically become referral evaluations.

The derogatory information during the reporting period was accurately documented on the OPR. However, it appears the applicant's rebuttal was not processed into the official record with the OPR. Regarding the PRFs, the comments are at the sole discretion of the Senior Rater and in accordance with AFI 36-2501, 1.6, *Senior Rater*, the Senior Rater is responsible for reviewing the officer's record of performance. Accordingly, all aspects of the OPR and PRFs were completed within established Secretary of the Air Force policies. Should the LOR be set aside or deemed invalid, the OPR and PRFs should be addressed for removal or correction.

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 3 Jan 23 for comment (Exhibit D), and the applicant replied on 22 Jan 23. In his response, the applicant contends the OPR was not properly processed in accordance with AFI 36-2406. AFI 36-2406, paragraph 1.10.2.9, states "All original documents will remain attached to the original evaluation. (T-1)." Furthermore, in accordance with AFMAN 90-161, a waiver from the T-1 level waiver authority is required to waive that provision. Therefore, in absence of a waiver from the AFPC/CC, his rebuttal was required to be attached to the OPR.

The applicant's complete response is at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION

AFPC/DPMSSM recommends denying the request. The applicant's commander issued him an LOR based upon the preponderance of the evidence. In accordance with AFI 36-2907, paragraph 4.1.3. *Standard of Proof*, while no specific standard of proof applies to administrative action proceedings, commanders should utilize the "preponderance of the evidence" standard when evaluating the evidence and every element of the offenses committed. A preponderance of the evidence means simply the greater weight of credible evidence. Whether such proof is available should be considered before initiating the administrative action. If such proof is lacking, administrative action is susceptible to being found to be legally unsupportable and, as a result, could be set aside. There is no requirement to prove any allegation beyond a reasonable doubt.

Although the LOR, dated 29 Jun 15, is not in the applicant's official military personnel record as it was either never filed or already removed, a review of a copy provided by the applicant reflects he acknowledged receipt of the LOR on 29 Jun 15, and on 29 Jun 15, he signed stating, "I am submitting the attached documents in response." While the applicant provided a copy of his response dated 6 Jul 15, the LOR reflects on 29 Jun 15, the commander signed the LOR and indicated the applicant did provide written matters in response to the LOR and consideration of all matters, he decided the LOR will remain in effect and be filed in the applicant's UIF.

Based upon the documentation provided by the applicant and analysis of the facts there is no evidence of an error or injustice. The applicant's commander issued an LOR based on the preponderance of the evidence in accordance with AFI 36-2907.

The complete advisory opinion is at Exhibit F.

AFPC/JA recommends denying the request. The LOR was served on the applicant by his commander on 29 Jun 15. There are three endorsements on the document: the first is signed by the applicant, acknowledging receipt of the LOR; the second endorsement is also signed by the applicant, indicating he has submitted a response to his commander to consider in rendering a final decision; and the third endorsement is signed by the commander, indicating he has considered the applicant's response and has decided to maintain the LOR. All three endorsements are dated 29 Jun 15. The applicant's response is dated 6 Jul 15.

In support of his claim the LOR was improperly administered, the applicant states, "Per AFI 36-2907, Chapter 2, Reg AF members are permitted three duty days to reply to the LOR and that reply must be considered in the rendering official's final decision to uphold or withdraw the LOR. As noted in the attached LOR, my comments were delivered to the official that administered the LOR of 6 Jul 15, the first duty day after I was discharged from an inpatient status. However, the rendering official's decision to uphold the LOR was dated 29 Jun 15, the same day the LOR was administered. The administering official never considered my response to the LOR as required by AFI 36-2907 and immediately made his final decision to uphold the LOR without receipt of my response."

Prior to serving an LOR on a member, though there is no required format, the entire document is typed out, including the required endorsements and signature blocks. In most cases, the date of the LOR is planned to be served will be typed at the top of the LOR. The first endorsement generally has open spaces within the body of the response to allow the member to write in the date and time he/she received the LOR. The second and third endorsements sometimes do, and sometimes do not, contain such open spaces. If they do not, the member and serving official typically write in the date at the top of the endorsements when they sign them. Alternatively, the date may be stamped or typed in.

With respect to the applicant's LOR, the first endorsement contained an open space, where the applicant wrote in "29 June 2015." The second and third endorsements contained no such spaces and "29 June 2015" was typed at the top of both endorsements. While they cannot know for sure what happened, it appears when the LOR was prepared, the individual who prepared it typed "29 June 2015" at the top of both endorsements. This supposition is based on two observations: First, when an endorsement has a typed date that is added after the document has been prepared, the dates do not generally look the same as the date at the top of the LOR. This is because the document has been printed out and passed around for signature, so any typed dates is usually added using a typewriter. In the applicant's case, all typed dates on the LOR look exactly the same. Second, the applicant's response is dated 6 Jul 15; however, the second endorsement, wherein the applicant indicated he submitted a response for his commander to consider, is dated "29 June 2015." That date should be "6 July 2015." Because it is not, it indicates "29 June 2015" had already been typed on the endorsement and the applicant did not change it. It is then logical to assume the "29 June 2015" that is on the third endorsement was also put there when the document was prepared, and the commander just did not change it either. The verbiage of the endorsement specifically states the commander considered the matters submitted by the applicant prior to arriving at a decision. The applicant has not provided any evidence to prove the statement is false, other than what may be best characterized as an oversight, an oversight of which the applicant himself is also guilty. Based on the foregoing, the request should be denied as the applicant failed to prove any material error or injustice that warrants relief.

The complete advisory opinion is at Exhibit G.

APPLICANT’S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinions to the applicant on 30 Jan 23, for comment (Exhibit H), 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 not the victim of an error or injustice. The Board concurs with the rationale and recommendations of AFPC/DP3SP, AFPC/DPMSSM, and AFPC/JA and finds a preponderance of the evidence does not substantiate the applicant’s contentions. The applicant contends the wing commander’s decision to uphold the LOR was dated the same day the LOR was administered and as required by AFI 36-2907; the wing commander never considered the applicant’s rebuttal response when he made his final decision. However, the commander’s endorsement specifically states he considered the matters submitted by the applicant prior to arriving at a decision and the applicant has not provided any evidence to the contrary. Moreover, the Board also agrees with AFPC/JA it is likely the LOR was prepared prior to the commander’s final endorsement with the incorrect date. Therefore, under the presumption of regularity the Board believes the commander in fact signed the LOR after considering the applicant’s rebuttal. In addition, while the applicant’s referral OPR appears not to have included the applicant’s rebuttal when processed into the official record as required by AFI 36-2406; the Board finds this oversight is administrative and does not constitute a material error or omission. More importantly, even with the alleged errors concerning the processing of the LOR and OPR, the applicant has failed to provide sufficient evidence the act that led to the LOR did not occur and therefore the reason for both the LOR and referral OPR are still valid. Finally, with respect to the Promotion Recommendation Form, the comments are at the sole discretion of the senior rater, who in accordance with AFI 36-2501, is responsible for reviewing the officer’s record of performance and rightfully considered both the LOR and the referral OPR that were issued to the applicant when making his recommendation. Therefore, in view of the forgoing, 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 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-2022-02393 in Executive Session on 4 May 23:

<i>Work-Product</i>	Chair, AFBCMR
<i>Work-Product</i>	Panel Member
<i>Work-Product</i>	Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 18 Jul 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DP3SP, dated 30 Dec 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 3 Jan 23.
- Exhibit E: Applicant's Response, dated 22 Jan 23.
- Exhibit F: Advisory Opinion, AFPC/DPMSSM, dated 25 Jan 23.
- Exhibit G: Advisory Opinion, AFPC/JA, dated 27 Jan 23.
- Exhibit H: Notification of Advisory, SAF/MRBC to Applicant, dated 30 Jan 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.

8/11/2023

X *Work-Product*

Board Operations Manager, AFBCMR

Signed by: *Work-Product*