

## **RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2022-02637

XXXXXXXXXXXXXXXX

**COUNSEL:** XXXXXXXXXXXXXXX

**HEARING REQUESTED:** YES

### **APPLICANT'S REQUEST**

1. The Letter of Reprimand (LOR), dated 24 Sep 19, be removed from his record.
2. His retired rank be changed to lieutenant colonel (O-5), and he receive full back pay from date of retirement.

### **APPLICANT'S CONTENTIONS**

Counsel, on behalf of the applicant contends sufficient relevant evidence demonstrates the existence of an error or injustice which warrants voiding and removing the negative decision regarding the applicant's Officer Grade Determination (OGD). He did not commit the misconduct alleged in the LOR that formed the basis for his reduction in rank. The LOR was based on accusations that were not investigated. The accusations of inappropriate relationships were made by his former girlfriend and considered the truth despite lack of corroboration. Proper investigation would have revealed the applicant did not have inappropriate relationships with fellow Airmen, and provided as evidence in support are statements made by women who should have been interviewed as witnesses. Further, the applicant's attempts to prove his innocence were severely hampered when his command refused to name the women with whom he was alleged to have committed misconduct. The entire investigation appears to consist of interviews with his former girlfriend and a senior noncommissioned officer (SNCO), as well as a few emails, screen shots of Instant Messages (IM), and photographs allegedly from a phone. No other witnesses were interviewed, and the applicant was not allowed the opportunity to request other witnesses or to provide pertinent exculpatory evidence.

From the inception of the investigation, the applicant was not provided due process. His right to privacy was violated by his former girlfriend, while she was still living with him, in the sanctity of his home. There was no justifiable reason for her to go through the applicant's passcode-protected personal devices. She went through his phone, computer, and his personal iCloud accounts for anything to hurt his career. She cherry-picked select emails and screenshots of messages on his government computer, illegally obtained, and included a list of women she claimed the applicant had sexual relationships with to support these baseless allegations, stating his actions were known by friends and previous co-workers. She also began a friendship with the SNCO and put ideas into his head about an inappropriate relationship between his spouse and the applicant. She then took this so-called evidence to military investigators who charged him with violations of the Uniform Code of Military Justice. Despite this egregious breach of trust and privacy, his former girlfriend never suffered punishment for her actions. She utilized her close relationship with her boss and his personal and professional relationships with the Commander, Air National Guard Readiness Center (ANGRC/CC) and Vice Commander, ANGRC (ANGRC/CV) to allow her behavior to be dismissed.

The applicant was enlisted from 1989-2002, for more than 13 years of his over 30-year career. His relationship with the SNCO's spouse began in 1999, when the applicant was enlisted. The

period investigated was fabricated only to encapsulate the time the women mentioned by his former girlfriend were still serving in the military. Nothing beyond his former girlfriend's uncorroborated claims establishes these dates. Though the SNCO claimed he became aware of a sexual relationship between his spouse and the applicant, he was mistaken. While his spouse was in an adulterous relationship at the time, it was with the SNCO's commander, and they were both subjects of a substantiated investigation. While the SNCO's spouse admitted to sending the applicant a photo in 2015, he emphatically did not solicit an explicit photograph or want one sent to him. Nor did he know a photo of that kind was on his iCloud account when his former girlfriend illegally searched through his password-protected personal devices.

The fact investigators stopped investigating after interviewing his former girlfriend and the SNCO is simply outrageous. Not even one of the women his former girlfriend claimed had inappropriate relationships with the applicant have verified the claims. The only statement provided was by the SNCO's spouse denying any fraternization, obtained by the applicant, in defense of himself. Three other enlisted females named by his former girlfriend were not interviewed by the investigators and the ANGRC/CV did not ask for such interviews, instead relying solely upon his former girlfriend's allegations, without corroboration. Notably, in over 30 years of service, there has not been a single woman who has made a claim against the applicant for inappropriate behavior or familiar language used toward them. The only person complaining of the applicant's treatment of other women, not to include herself, is his former girlfriend.

At the end of the investigation, based on hearsay and innuendo, investigators determined the applicant used his government emails to flirt and send unprofessional communications with co-workers and that he fraternized on multiple occasions with three enlisted and formerly enlisted females during the period of 1 Nov 12 – 30 Jul 18. They stated explicit photographs in his phone from 2015 were images of two enlisted females. Neither of these women were interviewed. They further contended statements and images from the applicant's phone showed an unprofessional relationship with a third enlisted female; however, no analysis was done to determine why anything found was inappropriate or unprofessional. Additionally, investigators found any claimed evidence provided regarding his former girlfriend's and SNCO's allegations of extramarital sexual contact with the SNCO's spouse, was inconclusive. Further, the investigation found that while the applicant forwarded a general officer nomination memorandum to his former girlfriend using his government email account, there was no nefarious purpose.

As a result of the investigation, on 24 Jun 19, the applicant was relieved of his duties in the Senior Leader Officer Management Office (SLOMO) and moved to the Commander's Action Group. On 24 Sep 19, the ANGRC/CV issued the applicant an LOR for the period 1 Nov 12 – 30 Jul 18, with no explanation of the pertinence of those inclusive dates. In the LOR, the ANGRC/CV stated the applicant had fraternized with various enlisted personnel, had explicit photos maintained in his phone, and had, without authority, released several general officer nomination packages to a company grade officer not assigned to SLOMO, who did not have the authority or requirement to review the records and Privacy Act-protected information in them. The LOR was issued under the Air Force Instruction (AFI) in effect at that time, AFI 36-2907, dated Nov 14, which became obsolete in May 20 upon re-issuance. The prior edition stated no standard of proof was necessary in paragraph 4.1.3. The AFI was amended to include a standard of preponderance of evidence in paragraph 2.2.

The applicant admitted to using familiar tones with colleagues in emails and stated he believed such usage was not a breach of good order and discipline. He adamantly denied any inappropriate relationships with anyone. He also admitted he showed his former girlfriend a general nomination memorandum, but stated he did so because she worked directly for that general officer and believed the package needed more current information to improve the

nomination and felt she could assist. He further apologized for his lapse in judgment regarding the general's nomination memorandum and for misunderstandings regarding platonic relationships that he fostered throughout his long career. Despite this submission, and more than thirty years of unblemished service, ANGRC/CV maintained the LOR on 15 Oct 19.

On 4 Nov 20, the applicant was given a referral Officer Performance Report (OPR) for the period 16 May 19 – 15 May 20, in accordance with AFI 36-2406, *Officer and Enlisted Evaluation Systems*. He was rated mostly positive in that OPR, meeting standards in job knowledge, leadership skills, organizational skills, and communication skills. The OPR noted in the Rater's Overall Assessment that the applicant was organized, a precise and efficient communicator, and insightful but had been issued an administrative LOR because he demonstrated a lapse in judgment and used unprofessional tone on government communications. The only negative feedback on this OPR was based on the LOR dated 24 Sep 19. The applicant could have submitted a rebuttal again but chose not to as the OPR made no mention of the unsupported hearsay claims of fraternization. He felt it unnecessary to repeat his response as the OPR merely noted that he had suffered a lapse of judgment and had used an unprofessional tone on government communications. It is important to note the OPR's language led to this decision as it was quite different from the harsh accusations by the ANGRC/CV. In his earlier rebuttal of the harsh language of the LOR, he acknowledged his mistake with the nomination memorandum and apologized for the familiar tone on government emails, also noting he had been vindicated as to any criminal or malicious intent with the nomination memorandum; therefore, there were no new matters to address. Finally, the applicant was informed the LOR was not going to be made part of his permanent personnel record and that it was not attached to the referral OPR. This was also a central part of his decision not to respond. To this day, the applicant has been told by the Air National Guard Human Resources Office that there is no negative paperwork in his file but for the referral OPR. The LOR was not placed in his Officer Selection Record or Personnel Records Display Application.

ANGRC/CV and the Director, SLOMO signed memorandums on 4 Nov 20 recommending involuntary curtailment of the applicant's Statutory Tour, which he had been on for almost 13 years, referring back to the LOR stating an official investigation revealed the applicant fraternized and cultivated unprofessional relationships with various enlisted personnel during the period 1 Nov 12 – 30 Jul 18. ANGRC/CV further noted he had violated the Privacy Act by releasing sensitive general officer information to an unauthorized company grade officer. The applicant again responded, reiterating his contentions regarding the allegations. The applicant then requested voluntary active duty retirement, effective 1 May 20, and was referred for an OGD due to the LOR and referral OPR.

The applicant's counsel submitted a response that spoke of how the evidence in the investigation was flawed, how the alleged misconduct had no impact on military effectiveness, and the only allegation that was supported was release of the general officer nomination memorandum. The applicant also submitted a response stating the accusations of fraternization and inappropriate relationships were completely inaccurate. He believed command did not believe the accusations to be credible as they moved him from the Army Readiness Center, where none of the women mentioned in the investigation worked, to the directorate where he was assigned 25 feet from a SNCO and within the same office as a civilian, both of which were specifically mentioned as having fraternized with or had inappropriate relationships with the applicant. Neither of these women were questioned by investigators or leadership. The ANGRC/CC determined on 17 May 21, that the applicant would be retired in the rank of major (O-4), using the LOR as justification. On 21 Dec 21, when provided compelling arguments by the applicant, the commander asked why this was the first he was hearing about them. It was clear the applicant's responses had not been forwarded to the commander.

The applicant still does not know to whom these claims of fraternization relate. “Various enlisted personnel” and “several NCOs and SNCOs” is simply not acceptable notice when bringing charges of such a serious nature against an officer. He has continuously asked but was not given the information needed to defend himself. Due process dictates that people are entitled to know their accuser. In this scenario, none of the “named” women are alleging misconduct by the applicant. Similarly, he was not allowed to see some of the actual evidence used against him to justify the LOR, beyond a few emails and screenshots of IM messages. Investigators refer to other evidentiary items in their Report of Investigation, to include a disc of photographs, and Enterprise Service Directorate contact done for a search of his Air Force email for the period 1 Jun 17 – 30 Mar 19, and a timeline of duty locations of the interested parties. The applicant has not been given any of these items. The investigation specifically speaks of photograph his former girlfriend alleged to have screenshot from one of the applicant’s personal devices, using her phone. He has not been afforded the opportunity to examine the screenshots, to see if they were authenticated as originating from his personal devices or given any meta data. The command came to a predetermined conclusion without giving the applicant a chance to properly defend himself. The applicant submitted a Freedom of Information Act (FOIA) request on 14 Dec 21 asking for all communications between the ANGRC/CC, ANGRC/CV, the general officer named in the investigation, and his former girlfriend containing his name. He was recently informed that his FOIA request will not be reviewed until Dec 23, despite the 20-day response requirement for FOIA.

Finally, the proper standard of proof was not applied to the applicant’s OGD. The standard of proof used in administrative matters changed dramatically in May 20, and should have been applied to his OGD. When the ANGRC/CV issued the LOR, AFI 36-2907, paragraph 4.1.3. had no specific standard of proof required in administrative proceedings, stating only commanders should utilize the preponderance of evidence standard when evaluating the evidence and every element of the offenses committed. In May 20, the permissive loose standard was replaced and was now required to be “a preponderance of evidence.” Although the new regulation was not in effect at the time his LOR was issued, it was in effect at the time of the OGD, and should have been used, but was not. The applicant is entitled to have the new standard applied in a serious allegation that cost him to lose grade and rank.

The applicant’s complete submission is at Exhibit A.

## **STATEMENT OF FACTS**

The applicant is a retired Air National Guard major (O-4) receiving retired pay.

According to Report of Investigation, dated 22 Jul 19, the applicant was investigated for violation of Article 92, Uniform Code of Military Justice (UCMJ), Failure to Obey a Lawful Order or Regulation; Article 133, UCMJ, Conduct Unbecoming an Officer and a Gentleman; Article 134, UCMJ, Fraternization; and Article 134, UCMJ, Extramarital Conduct.

On 24 Sep 19, ANGRC/CV issued the applicant an LOR because: On or about 1 Nov 12 and 30 Jul 18, he fraternized with various enlisted personnel, on terms of military equality and while assigned to National Guard Bureau SLOMO, released, without authority, several General Officer Nomination Packages to a company grade officer not assigned to SLOMO, who did not have authority or otherwise a requirement to review the records and the Privacy Act-protected information in these packages. The applicant provided a response to the LOR on 3 Oct 19.

On 4 Nov 20, according to AF Form 707, *Officer Performance Report (Lt thru Col)*, for the period 16 May 19 – 15 May 20, the applicant was “Issued administrative LOR” triggering a referral report, in accordance with Air Force Instruction (AFI) 36-2406, *Officer and Enlisted Evaluation Systems*.

On 4 Nov 20, according to ANGRC/CCX memorandum, the applicant was notified of a Referral Officer Performance Report for the period 16 May 19 – 15 May 20.

On 11 May 21, according to ANGRC/CC memorandum, the applicant was notified of an OGD and acknowledged receipt on 14 May 21.

On 28 May 21, the applicant provided a response to his notification of OGD.

On 9 Aug 21, according to ANGRC/JA memorandum to Director, Air National Guard (NGB/CF), the ANGRC/CC recommendation for OGD was legally sufficient, and JA concurred with recommendation that the applicant be retired in the rank of captain (O-3).

On 18 Aug 21, according to ANGRC/CC memorandum to NGB/CF, ANGRC/CC recommended an OGD, and that the applicant be retired in the rank of captain.

On 16 Nov 21, according to Secretary of the Air Force action, the applicant did not serve satisfactorily in the rank of lieutenant colonel within the meaning of Section 1370a of Title 10, United States Code (10 U.S.C. § 1370a); however, he did serve satisfactorily in the rank of major within the meaning of the above provision of law and it was directed that he be retired in that grade.

On 30 Apr 22, according to Special Orders No. XXXXX, dated 3 Dec 21, the applicant was relieved from active duty, organization, and station of assignment, and retired effective 1 May 22, in the rank of major.

According to Special Orders No. XXXXX, dated 3 Dec 21, Special Orders No. XXXXX, dated 3 Dec 21 was amended to include Remarks: Officer Grade Determination is completed. Per Secretary of the Air Force Memorandum dated 16 Nov 21, member served satisfactorily and is retired in the rank of major effective 1 May 22.

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

## **APPLICABLE AUTHORITY/GUIDANCE**

DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.4. 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.

AFI 36-2907, *Adverse Administrative Actions*, dated 26 Nov 14, 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 simply means 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.

AFI 36-2907, dated 7 Sep 18, paragraph 2.1.1. *Standard of Proof*. 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 simply means 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 2.6.3. *Records of Individual Counseling, Letters of Counseling, Letters of Admonishment, or Letters of Reprimand no longer contained in a Personnel Information File or Unfavorable Information File.* Air Force records contained in other Air Force records systems, not a unit Personnel Information File or a UIF [unfavorable information file], may not be rescinded by a commander or civilian director. After the disposition date of the record (in either a Personnel Information File or an UIF) has passed, members must apply to the Air Force Board for Corrections of Military Records to have their Record(s) of Individual Counseling, Letter(s) of Counseling, Letter(s) of Admonishment, or Letter(s) of Reprimand removed from other Air Force records systems.

AFI 36-2907, dated 22 May 20, paragraph 2.2. *Standard of Proof.* 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 exists when it is more likely than not that events have occurred as alleged. Preponderance of the evidence is not determined by the number of witnesses or exhibits, but by all the evidence and evaluating factors such as a witness’ behavior, opportunity for knowledge, information possessed, ability to recall, as well as related events and relationship to the matter being considered.

AFI 36-2406, *Officer and Enlisted Evaluation Systems*, dated 14 Nov 19, paragraph 1.10. Referral Evaluations. Referral procedures are established to allow the ratee due process by giving the ratee an opportunity to respond and/or rebut any negative ratings or comments before it becomes a matter of record. Additionally, it allows evaluators to consider all the facts, including any they may not have been aware of, prior to the evaluation becoming a matter of record. Performance Evaluation. Performance evaluations must be referred when: (1) Comments in any OPR, EPR, LOE, or TR (to include attachments), regardless of the ratings, that are derogatory in nature, imply or refer to behavior incompatible with or not meeting AF standards, and/or refer to disciplinary actions. When considering the Airman’s ability to meet standards, consider unacceptable performance as actions that are incompatible with, and/or Airmen who have routinely (a repeated inability to meet standards that would render the aggregated performance assessment over the entire reporting period as below Air Force standards and expectations) and/or significantly (a single instance where failure to meet standards is either egregious in nature or so far short of a standard that it impacts overall aggregated performance assessment) failed to adhere to established AF standards and expectations; or (2) When an officer fails to meet standards in any one of the listed performance factors, in Section III or Section IX of the OPR, the overall evaluation will be a "Does Not Meet Standards" and must be referred. Note: If the evaluation is marked “Does Not Meet Standards,” there must be a comment pertaining to the behavior in the referring evaluator’s assessment block. Comments in the referral memorandum do not meet this requirement.

Title 10, United States Code, Section 1370 (10 U.S.C. § 1370) – *Regular Commissioned Officers*

(a) *Retirement in Highest Grade in Which Served Satisfactorily.*

(1) *In general.* Unless entitled to a different retired grade under some other provision of law, a commissioned officer (other than a commissioned warrant officer) of the Army, Navy, Air Force, Marine Corps, or Space Force who retires under any provision of law other than chapter 61 or 1223 of this title shall be retired in the highest permanent grade in which such officer is determined to have served on active duty satisfactorily.

AFI 36-3203, *Service Retirements*, dated 29 Jan 21, paragraph 8.6. *OGD in Conjunction with Retirement (10 U.S.C. § 1370 and 10 U.S.C. § 12771)*. An officer is not automatically entitled to retire in the highest grade held. Instead, an officer is retired in the highest grade in which the officer served satisfactorily (with sufficient TIG [time in grade] or a waiver) as determined by the Secretary of the Air Force or delegate. The Secretary of the Air Force or delegate will normally seek the review and recommendation of the Secretary of the Air Force Personnel Council (SAFPC) prior to making a determination of satisfactory service for an OGD in the case of any officer in the grade of O-6 or below who is seeking to retire.

The determination of “satisfactory” or “creditable” service in a particular grade is a matter of Secretary of the Air Force discretion. Consideration of satisfactory or creditable service is not limited to the TIG required for the higher grade; rather, it includes the officer’s entire period of service in that grade. In considering whether an officer has provided satisfactory or creditable service, the Secretary of the Air Force or delegate will consider the following: the nature and length of the officer’s improper conduct, the impact the conduct had on military effectiveness, the quality and length of the officer’s service in each grade at issue, past cases involving similar conduct, and the recommendations of the officer’s chain of command. In some cases, a single incident of misconduct can render service in a grade unsatisfactory despite a substantial period of otherwise exemplary service. An OGD resulting in retirement in a lower grade is not punishment. It is an administrative action required by law that determines the highest grade in which an officer served satisfactorily.

Paragraph 8.6.3. *Initiating an OGD*. The unit commander or other appropriate authority must initiate an OGD when: The officer, since the last promotion, has been the subject of any substantiated adverse finding(s) or conclusion(s) from an officially documented investigation, proceeding, or inquiry conducted by competent military or civilian authorities (except minor traffic infractions), regardless of the command action taken against the officer (if any). Examples of officially documented investigations, proceedings, or inquiries include, but are not limited to: command-directed investigations (CDIs); Inspector General (IG) investigations; and Equal Opportunity investigations.

## **AIR FORCE EVALUATION**

NGB/A1PP (Force Management) recommends denying the application. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice. According to AFI 36-3203, paragraph 8.6.2., the determination of satisfactory or creditable service in a particular grade is a matter of Secretary of the Air Force discretion. On 11 May 21, the ANGR/CC issued the applicant an OGD notification for his misconduct that resulted in an LOR and a referral OPR, while serving on a Statutory Tour. The applicant contended he did not commit the misconduct that formed the basis for the LOR and the underlying investigation was incompetent and merely cursory. He further contended subsequent evidence proves his innocence and change in guidance provides additional rights that were not afforded to him.

In accordance with AFI 36-3203, paragraph 8.6., the unit commander (or appropriate authority) must initiate an OGD when an officer receives an LOR since their last promotion, and all packages must route to SAFPC for final determination. SAFPC determined the applicant did not serve satisfactorily in the rank of lieutenant colonel and should be retired as a major.

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 9 Nov 22 for comment (Exhibit D) but has received no response.

## **ADDITIONAL AIR FORCE EVALUATION**

SAF/MRBP (Personnel Council) recommends denying the application. The applicant has provided no evidence that would indicate the Air Force Personnel Board (AFPB) recommendation in this case or the ultimate decision by SAF/MRB represents an error or injustice, or that he has been treated differently than other similarly situated members. The applicant, through counsel, contended he was wrongfully reduced in rank through the OGD process. He is basing his request for relief on the violation of his right to privacy, the unsubstantiated evidence presented during the investigation, the lack of evidence and competent investigation, the failure of command to allow him to properly defend himself by providing him with names/evidence used to substantiate the allegations, and failure of command to use the proper standards of proof. The OGD was conducted in accordance with 10 U.S.C. § 1370a and AFI 36-3203.

Based on a Security Forces investigation, the applicant received an LOR for fraternization and for releasing Privacy Act-protected documents to an individual not authorized to receive them. The investigation revealed, between Nov 12 – Jul 18, the applicant fraternized with various enlisted personnel, with statements and sexually explicit photographs on his phone, which suggested he was engaging in inappropriate relationships with NCOs and SNCOs. Some of the inappropriate communications were found on government computers. In Apr 19, a SNCO provided a memorandum to his command detailing the inappropriate relationship between his enlisted spouse and the applicant, and how it impacted his life. The applicant's former girlfriend contacted the SNCO regarding topless and nude images of his enlisted spouse on the applicant's phone. The Major Command legal review noted, by a preponderance of evidence, the misconduct related to fraternization dated back to 2014. The AFPB adjudicated the applicant's case on 20 Oct 21. All members of the applicant's chain of command recommended his service in the ranks of lieutenant colonel and major be found unsatisfactory, resulting in a retired rank of captain. The AFPB concluded the applicant's service in the rank of lieutenant colonel was not satisfactory; however, while he committed misconduct while holding the rank of major, it was not so egregious as to render his service as a major as unsatisfactory. The AFPB concluded the applicant served satisfactorily in the rank of major. After thorough consideration, on 16 Nov 21, SAF/MRB (Secretary of the Air Force's delegatee in this matter) found the applicant did not serve satisfactorily in the rank of lieutenant colonel within the meaning of 10 U.S.C. § 1370a, but his service in the rank of major was satisfactory despite the misconduct in that rank. SAF/MRB directed the applicant be retired in the rank of major .

After a thorough review of this application, SAF/MRBP does not find the applicant's arguments or evidence sufficient to conclude his records should be corrected to reflect his retirement in the higher grade. While counsel makes a variety of arguments intended to impugn the underlying investigation, the investigation was found legally sufficient. The command's recommendations on the subsequent OGD were also found legally sufficient. The applicant's LOR response did not show any confusion concerning those with whom he allegedly fraternized, and counsel confirmed the applicant was provided portions of the Security Forces investigation to respond to the LOR. Additionally, the applicant could have requested a redacted copy of the investigation via the Freedom of Information Act. Although most of the investigation centered around materials provided by the applicant's former girlfriend, there is no indication the former girlfriend accessed or copied the applicant's personal data at the behest of the government or its agents. As such, there is no prohibition against Security Forces using the information provided in its investigation or the subsequent LOR and OGD processes.



The complete advisory opinion is at Exhibit E.

### **APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 21 Apr 23 for comment (Exhibit F), and the applicant replied on 20 May 23. In his response, the applicant contended he would stick to the legal evidence though he could go into enormous detail that supports his exoneration, under normal circumstances, from claims made against him by his former girlfriend. However, her close association with the general officer involved in the PII (Personal Identifiable Information) release has allowed her to make false, illegal, and subjective comments which were fed into an incomplete investigative summary made by the Security Forces investigator.

The applicant reiterated his concerns and questions regarding the investigative process and subsequent actions taken by the ANGRG/CV and ANGRG/CC, and again contended the incorrect standard of proof was used to substantiate the allegations of misconduct. He directed the Board to review the supporting documentation he provided with his application, which he claims exonerate him of fraternization and again contended the Security Forces investigator and his organizational leadership ignored this evidence. He stated the allegations of fraternization were intentionally left off his OPR, and the LOR not attached, because his immediate supervisory chain of command believed the allegations to be unsubstantiated.

Finally, the applicant suggests his former girlfriend has a sordid history that calls into question her credibility and this history has been ignored. He contended she had been directly involved in three known investigations. As a first lieutenant, she received an Article 15 for fraternization resulting in a chief master sergeant being retired as a senior master sergeant. With the support of her general officer supervisor, she initiated an investigation while living in the applicant's home, which ultimately resulted in his retirement as a major. Further, she was personally involved with a colonel who was fired from his position as wing commander in 2021, for unprofessional relationships and fraternization. All of this was known prior to his retirement, yet no one was interested in her habitual behavior and illegal activities. She clearly demonstrated conduct unbecoming an officer, yet she was rewarded and protected by senior officers.

In closing, the applicant contended he has been fighting the opinions and influences of the ANGRG/CV and ANGRG/CC and neither have substantiated their claims. His immediate supervisor was working with his counsel on a recommendation endorsing his retirement in grade, and that memo was provided with his application. Unfortunately, his supervisor passed away prior to signing the memorandum.

The applicant's complete response is at Exhibit G.

### **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 NGB/A1PP and SAF/MRBP and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board found that although the applicant claimed the evidence presented during the investigation was unsubstantiated, in responses to his LOR and OGD, and again in his application to this Board, he acknowledged using familiar tones when communicating with his

colleagues, having sexually explicit photographs of an enlisted member on his phone, and releasing PII data to an unauthorized person. While the applicant contended the information used to support the allegations of misconduct was obtained by his former girlfriend via an invasion of his privacy, there was no evidence that she accessed and copied the applicant's personal data at the behest of the government or its agents. Further, the Board found the applicant's contention regarding the change in standard of proof required for adverse administrative actions defined in AFI 36-2907, dated 22 May 20, vice the earlier 26 Nov 14 version, to be moot. The LOR was issued on 24 Sep 19, utilizing guidance from AFI 36-2907, dated 7 Sep 18, which states the standard of proof for adverse administrative actions is the "preponderance of the evidence."

Additionally, the Board finds the applicant's contention that he was unable to provide a defense due to command's refusal to provide the names of the individuals with whom he is alleged to have inappropriate relationships with unconvincing. References to specific individuals, and supporting documentation, found in the applicant's response to his LOR, OGD, and AFBCMR application suggest he had knowledge, if not confirmation, of the individuals named in the investigation. The applicant also alleges his former girlfriend has a sordid history that calls into question her credibility and this history has been ignored and has clearly demonstrated conduct unbecoming of an officer, yet she was rewarded and protected by senior officers. In this respect, per DAFI 36-2603, the Board is not an investigative body and finds the applicant's assertions fail to sustain his burden of proof he received disparate treatment or that the LOR, referral OPR, or OGD he received were unjust or in error. Finally, the applicant was afforded due process upon receipt of the LOR, and the subsequent OGD, initiated in accordance with AFI 36-3203, was found to be legally sufficient. 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 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-2022-02637 in Executive Session on 15 Jun 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 12 Sep 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, NGB/A1PP, dated 7 Nov 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Counsel, dated 9 Nov 22.
- Exhibit E: Advisory Opinion, SAF/MRBP, dated 19 Apr 23.
- Exhibit F: Notification of Advisory, SAF/MRBC to Counsel, dated 21 Apr 23.
- Exhibit G: Applicant's Response, dated 20 May 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.

X

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Board Operations Manager, AFBCMR