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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02675

Work-Product

COUNSEL: *Work-Product*

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Letter of Reprimand (LOR) dated 4 Dec 17, and any associated documents, be rescinded and expunged from his Master Personnel Records Group (MPerRGp) and Officer Selection Record (OSR).

APPLICANT'S CONTENTIONS

In the spring of 2017, he was interviewed as a witness to alleged misconduct, which occurred while on deployment in *Work-Product* and involved an unprofessional relationship between two fellow officers in his squadron, Major (Maj) M and Lieutenant Colonel (Lt Col) T. Although he was not privy to the entire contents of the investigation, he understood that it revealed significant unprofessional behavior by Maj M, who then falsely accused him of paying a stripper to bring her onto a gentleman's club stage and for making comments that referenced her naked body after she had voluntarily disrobed on stage. These allegations are in retaliation because he had previously counseled her about both her unprofessional behavior and an apparent unprofessional relationship with Lt Col T during the deployment.

On 4 Dec 17, he was issued a Joint LOR from his Wing Commander (WG/CC) and the Air National Guard Readiness Center Commander (ANGR/CC). The contents of the LOR mirrored Maj M's false allegations, which he maintains were only brought in retaliation to him revealing her unprofessional behaviors to investigators. Of primary importance to both him and his civilian counsel was the need to obtain and review the evidence against him in order to prepare and submit a response to the LOR. However, despite numerous requests by him and his counsel, the Air Force Office of Special Investigations (AFOSI) and the servicing legal office both refused to provide a copy of the investigative materials. Most notably, the statements of his accuser, Maj M, and her alleged paramour, Lt Col T, or any other individual that was present at the gentlemen's club failed to be provided. On 19 Jan 18, despite having very little evidence related to his case or the opportunity to confront the false allegations, he submitted his response to the LOR in order to comply with the timeline he was given. Days after submitting his response, he was informed that his leadership had elected to maintain the LOR and establish an Unfavorable Information File (UIF). However, at the same time, he was verbally informed by his WG/CC that the LOR would be kept locally and would not impact his Air Force career or future promotability.

He was personally told by his WG/CC that he, the WG/CC, "had to do something" because the case involved a "sexual assault allegation." He then learned, that in addition to falsely claiming that he paid a stripper to bring her on stage and then made inappropriate comments about her body, Maj M *also* *<emphasis added>* alleged that he had committed abusive sexual contact against her. However, he reiterates that he has been denied the opportunity to review the evidence of this allegation and the details have never been made clear.

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In Aug 17, despite the fact they had found no corroborating evidence of this allegation, AFOSI “titled” him in the Defense Central Index of Investigations (DCII) for “Abusive Sexual Contact,” an offense under Article 120 of the Uniform Code of Military Justice (UCMJ); however, the offense was not included on his LOR. In this regard, his counsel requested that AFOSI remove his information from the Combined DNA Index System (CODIS) and the request was granted.

Two years after the UIF was established and following a permanent change of station (PCS) move to another State’s ANG unit, the gaining ANG WG/CC, per AFI 36-2907, *Unfavorable Information File (UIF) Program*, removed both the LOR and the associated UIF from his record and he was subsequently promoted to Lt Col. However, in Sep 19, as he was working through the promotion process, he contacted SAF/IGQ who informed him that his LOR would be maintained in an “IG database” for a period of ten years despite both the LOR and UIF being disposed earlier. How SAF/IG obtained a copy of his LOR remains unknown to him. However, his suspicions that Lt Col T, who was surprisingly placed in an IG position and who worked for the IG office between 2017 and 2019 pending his own investigation and punishment, up routed the LOR are reinforced due to the assurances that he had received from his immediate chain of command that the LOR would not impact his Air Force career or future promotability.

He believes that if the LOR is allowed to remain in his MPerRGp and OSR, it will have a direct negative affect on his promotability and career advancement and as such, it represents both a legal error and factual injustice for the following reasons:

- a. The LOR was issued and maintained in violation of his basic right to due process.
- b. The LOR’s existence in his MPerRGp and OSR violated DoDI 1320.04, *Military Officer Actions Requiring Presidential, Secretary of Defense, or Under Secretary of Defense for Personnel and Readiness Approval or Senate Confirmation*, and DAFPM2021-36-03, Department of the Air Force Policy Memorandum (DAFPM2021-36-03) *on Adverse Information for Total Force Officer Selection Boards*, 14 Jan 21.
- c. The LOR is unsupported by credible evidence.
- d. His service record before and since the LOR, along with the support of those involved in the LOR’s issuance and later disposition, justifies the requested relief.

The applicant’s complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 15 Jun 17, after being issued a LOR, Maj M filed an unrestricted sexual assault allegation against the applicant stating that he had groped her inner thigh on 27 Jan 17. In response and on the same date, the [Work...] Operations Group Commander (OG/CC) issued a No Contact Order (NCO) and a Military Protective Order (MPO). The NCO/MPO required that the applicant not contact Maj M by any means, and he was required to stay 100 feet from her, her residence, and her workplace. The sexual assault allegation was investigated by AFOSI from that date until 29 Aug 17 when they provided a Report Of Investigation (ROI) to the [Wo...] WG/JA for consideration. On or about 15 Nov 17, the WG/JA officially provided the ANGRC/JA and the [Work...] WG/JA with notice that it did not intend to pursue court-martial or non-judicial punishment (NJP) action against the applicant.

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From 15 Jun 17 – 29 Aug 17, the Air Force Office of Special Investigations (AFOSI) conducted an investigation into the allegation of “Abusive Sexual Contact” based on unrestricted report of sexual assault that occurred when both were visiting a gentlemen’s club (strip club) during a unit temporary duty assignment to [Work-Prod...]. The complaint alleges that after she had consensually went on stage where the stripper disrobed her, she went to sit down next to the applicant and he grabbed her right buttock, over her skirt, and squeezed. He then ran his hand down her leg and came back up the inner thigh, and she grabbed his hand and pushed it away. She then asked him where her underwear was located, to which he replied, “what are you talking about”, but subsequently pulled her underwear from his back pocket and said he hoped she wouldn’t ask for them back. Although the applicant declined to speak to AFOSI as part of the investigation, the OSI investigator was able to review the sworn statement made by the applicant contained within a Command Directed Investigation. (Note: This CDI was in response to allegations that Maj M and Lt Col T were involved in an unprofessional relationship.) In his sworn statement, the applicant also states that she consensually went on stage. However, his version differs in that when she got back to the table, he stated that “. . . Her underwear had been kicked back to his table and he returned it to her.” However, multiple interviews of military members (officers and enlisted) present at the Viking’s Gentlemen’s Club during the time of the incident indicated no one witnessed the applicant touch Maj M’s buttocks or thighs throughout the night, to include when she got off the stage.

On 4 Dec 17, based on the AFOSI ROI, the [Work-Prod...] WG/CC and the ANGRCC/CC issued the applicant a Joint LOR for “disgraceful and dishonorable” behavior and fraternization. Specifically, his LOR states, “At this gentlemen’s club, with [Work-Prod...] Wing enlisted personnel, you were intoxicated and paid a stripper to bring a fellow [Work-Prod...] field grade officer, Maj M, on stage. The stripper proceeded to completely undress Maj M, leaving her completely nude in the presence of fellow [Work-Prod...] WG officers and enlisted members. Failing to recognize the inappropriateness of your conduct, you made several comments after the incident referencing Maj M’s naked body.”

On 18 Jan 18, the applicant submitted a response to the LOR and on 31 Jan 18, the applicant’s wing commander decided to maintain the LOR and place it in a UIF.

On 5 Feb 18, the applicant acknowledged of the final decision regarding his LOR and the establishment of the UIF.

For more information, see the excerpt of the applicant’s record at Exhibit B, the advisory at Exhibit C. The AFOSI Report of Investigation is at Exhibit F.

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

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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; 4. Letters of Reprimand.

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.

Department of the Air Force (DAFI) 36-2907, *Adverse Information*, paragraph 2.2, the Standard of Proof for adverse administrative actions is the “preponderance of 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 facts such as a witness’ behavior, opportunity for knowledge, information possessed, ability to recall, as well as related events and relationships being considered. 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.

AIR FORCE EVALUATION

DCANG/SSJA recommends denying the request. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice. The applicant, Lt Col T, and Maj M were part of a group deployed from the **Work-P...** Operations Group in Title 10 status as part of a Theater Support Package (TSP). During the deployment, the applicant and Maj M socialized in the same group and were also noted to spend time together outside the group and the pair were known to frequent bars, restaurants, and strip clubs together. On or about 27 Jan 17, the applicant, Maj M and others attended a strip club together. A number of enlisted members were also at the strip club. During the evening, Maj M and the applicant worked together to have a performer take Maj M on stage and remove her clothes were all the officers and enlisted members present were able see her on stage, naked. Later, in Jun 17, Maj M alleged that when she left the stage, the applicant hid her underwear from her and touched her on her upper, inner thigh without her permission.

On 15 Jun 17, after being issued a LOR for an unprofessional relationship with another officer, Maj M filed an unrestricted sexual assault allegation against the applicant stating that he had groped her inner thigh on 27 Jan 17. The sexual assault allegation was investigated by AFOSI who provided a Report Of Investigation (ROI) to the **Wor...** WG/JA for review. The **Wo...** WG/JA then officially provided the ANGRC/JA and the **Wor...** WG/JA with notice that it did not intend to pursue

court-martial or non-judicial punishment (NJP) action against the applicant. However, based on the ROI, the ANGRC/CC and the Work-P... WG/CC jointly issued the applicant an LOR for fraternizing with enlisted members and exhibiting poor leadership during the 27 Jan 17 strip club visit. After considering the applicant's response, the Commanders imposed the LOR and an UIF was established. The DCANG, per AFI 90-301, *Inspector General Complaints Resolution*, notified SAF/IG of the LOR.

The applicant alleges that he is the victim of "legal error and factual injustice" such that a variety of documents should be purged of mention of his LOR and provides four (4) possible theories of relief: the LOR was issued and maintained in violation of his basic right to due process; the LOR's existence in his MPerRGp and OSR violates DoDI 1320.04 and DAFPM2021-36-03; the LOR is unsupported by credible evidence; and finally, his service record before and since the LOR, along with the support of those involved in the LOR's issuance and later disposition, justifies the requested relief.

However, as stated below, his claims for relief ignore both the facts of his case and Air Force regulations:

a. The evidence supporting the LOR exceeded Air Force standards for LORs. The applicant claims that "[t]he LOR is unsupported by credible evidence." He also argues, "I was not provided a copy of the evidence against me prior to being required to respond to the LOR. As such, I was unable to meaningfully respond to the allegations contained in the LOR or adequately defend myself against these false allegations."

The process for issuing LORs is described in AFI 36-2907, Chapter 4, "Commanders, supervisors, and other persons in authority can issue administrative counseling, admonitions, and reprimands. These actions are intended to improve, correct, and instruct subordinates who depart from standards of performance, conduct, bearing, and integrity, on or off duty, and whose actions degrade the individual and unit's mission." Further, it prescribes a "preponderance of the evidence" standard, rather than a reasonable doubt standard, to commanders who are evaluating whether to impose an LOR. If after weighing the applicable evidence against the individual's response, an LOR may be imposed if the "greater weight of credible evidence" still supports the proposed administrative action. If a LOR is imposed against an officer, then an UIF is "mandatory". The AFI does not require the government to provide an individual with documentary or other evidence in support of the LOR, just a written indication of "[w]hat the member did or failed to do, citing specific incidents and their dates."

The applicant was issued a LOR from the ANGRC/CC and the Work-... WG/CC for fraternizing with enlisted members and exhibiting poor officership. Although not required by the AFI, the applicant received evidence that *both Commander's* <emphasis added> relied upon when deciding to serve the LOR. Specifically, he was provided with over 40 pages of evidence from the OSI report which included: the applicant's 17 May 17 interview with AFOSI; the applicant's 23 May 17 interview with AFOSI, including attached notes from earlier CDI interview; copies of his GroupMe messages; the <name redacted> witness statement; and the <name redacted> witness statement. He then used this evidence to build a response in which he accepted responsibility for poor judgement and admits being at a strip club with enlisted members. Subsequently, both Commanders considered his response and decided that the response did not overcome the weight of evidence or obviate the need to issue a written reprimand.

b. AFI 36-2907 and DAFPM2021-36-03 mandated procedures for notifying SAF/IG and creating an UIF. AFI 36-2907 contains the protocols and procedures for the establishment and maintenance of UIFs. With the issuance of the LOR if an LOR is imposed against an officer, then an UIF is

“mandatory”. As discussed earlier, a LOR imposed on an officer triggers the mandatory establishment of a UIF. Additionally, “all substantiated findings of wrongdoings against field grade officers” are required to be reported by the servicing unit to SAF/IGQ. In accordance with (IAW) AFI 90-301, paragraph 1.16.15, Officer UIFs may be transferred between components when members transfer or PCS. Further, IAW AFI 36-2907, paragraph 2.6 states, Officer UIFs may be removed early if the triggering document is removed. However, as, DAFPM2021-36-03 requires selection boards to consider “Substantiated finding(s) or conclusion(s) from an officially documented investigation or inquiry, approved on or after 1 Jan 12, where a commander decided not to issue written command action or the command actions is not available.” Additionally, it requires officer selection boards to consider “[s]tandalone LORs and LOAs issued on or after 1 Jan 12.”

His LOR triggered the establishment of a UIF and, IAW AFI 90-301, the servicing unit, notified SAF/IG of the LOR and throughout the remainder of his time with his then ANG Wing, the UIF remained in his record. However, in the Spring of 2019, he transferred to another ANG Wing, who accordingly gained administrative command and control (ADCON) of the applicant. As such, they then became responsible for all personal matter related to him, to include: the maintenance of his UIF; care and maintenance of his personnel records; and the creation and servicing of his OCR. As such, his new ANG WG/CC was allowed to “dispose” of the LOR and UIF.

Accordingly, the Board should reject his request. Given that the LOR process applied in the applicant’s case exceeded the requirements of AFI 36-2907 and that he had the opportunity to have his arguments against the LOR be considered by two commanders in two separate organizations, his claims of evidentiary insufficiency and procedural due process fall short. In fact, he received more process and consideration than most in his situations. Finally, whether the totality of the applicant’s service record overcomes a period of poor officership is best left for an officer selection board to determine.

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 21 Mar 23 for comment (Exhibit D), and the applicant replied on 13 Apr 23. In his response, the applicant reiterated his contentions that the “error and injustice” in this case is two-fold: (1) the original case against him lacked due process and sufficient evidence; and (2) the continued existence of the LOR in his selection record runs contrary to Air Force policy and the intent of those who issued it. He also contends that the DCANG/SJA not only failed to address the factual and procedural deficiencies in this case, but they made additional false claims that are not supported by the evidence in order to further discredit his reputation in an attempt to justify a LOR that should have never been issued.

The support of those involved in the LOR’s issuance and its later disposition demonstrated that the LOR should not continue to affect his Air Force career and future promotability. The Work-Pro... Wing leadership removed the LOR and UIF from his personnel record at the first opportunity and have written character references on his behalf. It was never intended to impact his career to this extent as the <State> Adjutant General will not let him serve in any full-time or leadership position and by default removes any chance at promotion that would have otherwise been essentially automatic based on his stellar record of performance. Finally, it should be apparent that these allegations were made against him by others to deflect from their own wrongdoing. As such, he respectfully requests the Board to grant his request and clear his record.

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 DCANG/SSJA and finds a preponderance of the evidence does not substantiate the applicant's contentions. While the applicant contends that the LOR is unsupported by credible evidence and was issued and maintained in violation of his right to due process, the Board finds otherwise. The applicant received the evidence that both his Commanders relied upon, to include; over 40 pages from the AFOSI report, his own AFOSI interview, witness' statements, and his own social media message, when they decided to serve the applicant the LOR. He was then afforded the opportunity to use this evidence to build his response, which both Commanders then considered before determining that his response did not overcome the preponderance of the evidence against him. As such, the Board determines that the LOR process applied in the applicant's case exceeded the requirements set forth by the governing directives and that his claims of evidentiary insufficiency and procedural due process fall short as he was afforded the opportunity to have his arguments be considered by two separate commanders in two separate organizations. In fact, he received more consideration than most other officers in similar situations. Finally, the Board determines that whether or not the totality of his service record overcomes a period of poor officership is best left for an officer selection 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 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-2022-02675 in Executive Session on 30 May 23:

<i>Work-Product</i>	Panel Chair
<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 19 Nov 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, DCANG/SJA, w/atchs, dated 26 Feb 23.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 21 Mar 23.
- Exhibit E: Applicant's Response, w/atchs, dated 13 Apr 23.
- Exhibit F: AFOSI Report of Investigation (WITHDRAWN).

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.

4/30/2024

X  *Work-Product*

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