

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02815

XXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. His nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), dated 12 Jun 95, be removed from his records.
2. His referral officer performance report (OPR), for the period 23 Jul 94 through 22 Jul 95, be removed from his records.
3. He be promoted to the rank of lieutenant colonel (O-5).

APPLICANT'S CONTENTIONS

Counsel on behalf of the applicant, requested he be promoted to lieutenant colonel and his Article 15 be removed from his military records. Counsel summarized his military career and contended during his extensive service, he only had one small misstep. After being reassured by numerous superiors that it was not a violation of Air Force regulations, the applicant engaged in a sexual relationship with a defense paralegal. On 20 May 95, the applicant was issued an Article 15 for this relationship and given a referral OPR.

After being passed over for promotion due to the Article 15, the applicant was promoted to major (O-4) on 1 Oct 02. The Article 15 should have been removed from his records at that time, but it was not. On 5 Nov 10, the Air Force Board for Correction of Military Records (AFBCMR) directed the Article 15 be removed from his military records and he be considered for promotion to lieutenant colonel. He never received this promotion.

Furthermore, the applicant was advised he would be promoted if he accepted a position as Director, F-16 Foreign Military Sales Delivery Program, and again if he agreed to deploy. After an annual inspection, his program was cited as an office "strong point" and he was recognized as an "outstanding performer." Just prior to this inspection, his new commander, citing the Article 15, stated he would not recognize the previous agreement, and instead continued to use the carrot and stick promotion method. He again was told he would be promoted if he deployed; however, he was unable to find a compatible billet and as a result, his commander gave him a "Promote" instead of a "Definitely Promote."

Following his second pass-over for promotion to lieutenant colonel, he was selected for continuation and another three-year period beyond his mandatory separation date. He transferred to the Retired Reserve in the grade of major, after serving over 22 years.

Counsel contended the Article 15 and referral OPR should have been removed from his records following his promotion to major. Before the 2021 change in guidance, retroactive to Jan 12, adverse information was not required to be provided to a promotion board. Article 15 actions were also routinely removed from files upon promotion to major. For unknown reasons, this removal did not occur in the applicant's case. Additionally, the action was not removed even after the AFBCMR directed its removal. The AFBCMR memorandum should have led to the

immediate removal of the Article 15 and referred OPR from the applicant's file, and prior to the convening of a Special Selection Review Board.

There was a clear material error when the applicant's Article 15 and referral OPR were not removed from his file at two distinct times in which they should have been. The removal of the adverse actions would have allowed him to receive a "Definitely Promote" rating, and therefore, he would have likely been promoted to lieutenant colonel upon first review.

There was a grave injustice when he was passed over for promotion numerous times. He had been assured after receiving the Article 15, that with hard work he would be able to recover his career. When passed over for his first opportunity to promote to major, he was advised it was solely because of the Article 15 and referral OPR and told the same again when he was not given a "Definitely Promote" for his first and subsequent lieutenant colonel boards. While the applicant did eventually promote to major, his career stopped there even though he possessed all the qualities and work ethic that should have easily propelled him to lieutenant colonel. The applicant had no other missteps and served honorably for over 22 years. He was first considered for promotion to lieutenant colonel in 2007. Over five years passed before he retired, and he still did not receive the promotion. If not for the unwarranted stain on his military record, he would have been promoted. In support, counsel detailed the applicant's service history, awards and decorations, post-service accomplishments, and letters of commendation he received.

In conclusion, counsel summarized his contention that a material error occurred when the applicant's Article 15 and referral OPR were not removed from his record after his promotion to major or after it was directed they be removed in 2010. These errors led to injustices in the applicant's career and his ability to receive all the benefits he deserves in retirement; therefore, he requests the Article 15 and referral OPR be removed from his military records, and he be promoted to lieutenant colonel.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force Reserve major awaiting retired pay at age 60.

On 12 Jun 95, according to AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, the applicant was issued nonjudicial punishment under Article 15, UCMJ, when on or about 31 Mar 95, he wrongfully, dishonorably, and disgracefully compromised his character and standing as an officer and a gentleman by maintaining an unprofessional close and personal sexual relationship with a senior airman (E-4) in violation of Article 133, UCMJ. He received a reprimand and forfeiture of \$1000 pay per month for two months. On 27 Jul 95, the nonjudicial punishment was found legally sufficient.

On 7 Sep 95, according to Numbered Air Force Commander (NAF/CC) memorandum, the NAF/CC directed the applicant's Article 15 punishment, dated 12 Jun 95, be filed in his Officer Selection Record (OSR).

On 3 Apr 96, according to AF Form 707B, *Company Grade Officer Performance Report*, for the period 23 Jul 94 through 22 Jul 95, the reviewer marked two elements in Section V, *Performance Factors*, as "Does Not Meet Standards," triggering the referral process. The reviewer's comments noted the applicant's unprofessional sexual relationship with a female airman; however, comments do not specifically reference the Article 15.

On 11 Apr 96, the applicant provided a response to the referral OPR, and on 2 May 96, the NAF/CC considered his response and concurred with the report as written.

In a memorandum dated 28 Jan 10, the applicant requested his Article 15, dated 12 Jun 95, be removed from his OSR for his 2010 above-the-promotion-zone (APZ) lieutenant colonel board. On 25 May 10, his commander approved the request.

On 20 Aug 10, according to HQ ARPC/DPP (Director of Personnel Management) memorandum, the applicant was notified of his second deferral for promotion to lieutenant colonel. Due to the deferral, he would be automatically transferred to the Retired Reserve on his adjusted mandatory separation date of 1 Mar 11, in accordance with Title 10, United States Code, Section 14506. The memorandum states the specific reasons why the applicant was not recommended for promotion are known only to the combined membership of the board.

On 20 Aug 10, according to HQ USAF/RE (Chief of Air Force Reserve) memorandum, the applicant was notified of his selection for continuation on the Reserve Active Status List. On 24 Aug 10, the applicant accepted continuation and acknowledged that with his acceptance, his mandatory separation date would be adjusted to 1 Mar 14.

On 24 Aug 10, according to DD Form 149, *Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552*, the applicant applied to the AFBCMR requesting removal of the Article 15 from his OSR for his 2009 in-the-promotion-zone (IPZ) lieutenant colonel board, contending the Article 15 contributed to his non-selection.

On 5 Nov 10, according to AFBCMR BC-XXXX-XXXXX directive, the applicant's records were to be corrected to show the nonjudicial punishment under Article 15, UCMJ was removed from his OSR prior to the convening of the Calendar Year 2009 (CY09) Line and Health Professions Lieutenant Colonel Promotion Selection Board on 1 Jun 09, and he would be considered for promotion to the rank of lieutenant colonel by a special selection board (SSB) for the CY09 Line and Health Professions Lieutenant Colonel Selection Board and any subsequent boards for which the nonjudicial punishment was a matter of record.

On 10 Mar 11, according to HQ ARPC/DPBB (ARPC Promotion Board) memorandum, the applicant was considered, but not selected, by the SSB, CY09 Air Force Reserve Participating Reserve Line Lieutenant Colonel Promotion Selection Board.

On 17 Mar 12, according to Reserve Order XXXXX, dated 2 May 11, he was relieved from assignment, assigned to the Retired Reserve Section and placed on the USAF Reserve Retired List.

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

APPLICABLE AUTHORITY/GUIDANCE

AFI 36-2608, *Military Personnel Records Systems*, dated 30 Aug 06 (Certified Current 17 Sep 10), paragraph 8.10, Nonjudicial Retention Period, states for lieutenant colonels and below, keep the nonjudicial punishment in the selection record until the officer is afforded one IPZ or APZ consideration. Remove nonjudicial punishment from a selection record upon receipt of an approved appeal to have the nonjudicial punishment removed from the selection record. If an officer does not appeal to have the nonjudicial punishment removed from the OSR after an IPZ or APZ consideration, the nonjudicial punishment will remain in the OSR until the officer retires, separates, or dies.

Paragraph 8.10.2. Removal of nonjudicial punishment from the OSR has no bearing on the permanent filing of the nonjudicial punishment in the master personnel record (Correspondence

and Miscellaneous Group). All nonjudicial punishments are permanently retained in the master personnel record (Correspondence and Miscellaneous Group) unless set aside in their entirety in accordance with AFI 51-202, *Nonjudicial Punishment* (replaced by DAFI 51-202).

Paragraph 8.12.1.1. Lieutenant colonels and below cannot request removal of an Article 15 from the OSR until they have been afforded an IPZ or APZ consideration. Members cannot request early removal; only the wing commander or review authority may request early removal as an exception to policy. Paragraph 8.12.2.1 states the affected officer requests removal of the Article 15 from the OSR via memorandum to wing commander or review authority.

DAFI 51-202, *Nonjudicial Punishment*, dated 4 Jan 22, (DAFGM2023-01, 21 Aug 23), paragraph 5.7, states set aside occurs when the punishment, or any part or amount thereof, whether executed or unexecuted, is removed from the record and any rights, privileges, pay, or property affected by the relevant portion of the punishment are restored. A commander may not set aside punishment more than four months after execution of the punishment, unless the commander determines unusual circumstances exist and provides a written explanation. Set aside is not normally considered a rehabilitation tool, like suspension, remission, and mitigation. Commanders should not routinely set aside punishment, but should exercise discretionary authority only in the rare and unusual case where a question concerning the guilt of the member arises or the best interests of the DAF are served by clearing the member's record. Setting aside a punishment in its entirety restores the member to the position held before imposition of the punishment, as if the nonjudicial punishment had never been initiated.

AFI 36-2401, *Correcting Officer and Enlisted Evaluation Reports*, dated 10 Mar 06, paragraph 1.1 states the Commander, Air Force Personnel Center (AFPC/CC), establishes an Evaluation Reports Appeal Board (ERAB) to assess requests to correct evaluation reports and substantiated errors or injustices on active duty or extended active duty (EAD) personnel. The Commander, Air Reserve Personnel Center (ARPC/CC), establishes the ERAB to assess requests to correct evaluation reports and to correct substantiated errors or injustices on non-EAD personnel. Paragraph 3 states a member may file an appeal to correct or remove an evaluation report from their record if they believe the report is incorrect or unjust. The member must clearly and concisely state their request, ensure no rule in this instruction prohibits their request, and provide clear evidence to support their application. Supporting statements must have dates and signatures and contain information specifically related to the period of time and issues pertaining to their application.

AIR FORCE EVALUATION

ARPC/PB (Selection Board Secretariat) recommends denying the applicant's request for promotion to lieutenant colonel and removal of the Article 15 from his record. On 24 Aug 10, the applicant applied for correction of his military record to remove the Article 15 from his OSR in accordance with AFI 36-2608, *Military Personnel Records Systems*, paragraph 8.12.2. On 1 Oct 10, ARPC/PB provided an advisory stating he was given non-select counseling following the CY09 Lieutenant Colonel Line and Health Professions Promotion Selection Board, at which time he was told his Article 15 was still in his OSR and he had an opportunity to request its removal based on the standard outlined in AFI 36-2608. He then requested removal of the Article 15, and it was removed from his OSR by proper authority at that time. It must be noted, the Article 15 was removed from the OSR and not the master personnel record in accordance with AFI 36-2608. Only the OSR is presented to the selection board members when considering eligible officers for promotion. Additionally, ARPC/PB recommended the removal date of the Article 15 be retroactive to a date prior to the CY09 Lieutenant Colonel promotion board.

On 5 Nov 10, the AFBCMR approved the applicant's request retroactively removing the Article 15 [from the OSR] and directed he meet an SSB for the CY09 Lieutenant Colonel Line and

Health Professions Promotion Selection Board. The SSB convened on 8 Mar 11, and the OSR did not include the Article 15. The applicant was not selected for promotion to lieutenant colonel.

The Article 15 was properly removed, and the applicant was considered by the SSB. There is no evidence the board acted improperly or contrary to law or applicable policy. 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 19 Dec 22 for comment (Exhibit D), and the applicant replied on 30 Mar 23. In his response, counsel contended it is the applicant's belief the Article 15 was not removed from his military record prior to the date the 2011 SSB convened, and the Article 15 caused his failure to promote to lieutenant colonel. Additionally, the referral OPR that accompanied the Article 15 was also part of the information the SSB considered in 2011. Counsel reiterated the contention the Article 15 and referral OPR were not removed following his promotion to major or even after directed by the AFBCMR, and it was a clear material error when they were not removed from his file at the two distinct times in which they should have been. The removal of these adverse records would have allowed him to receive a "Definitely Promote" rating, and he would have likely been promoted to lieutenant colonel.

Further, counsel contended the applicant possessed all the requisite technical skills and character traits to continue his service in the Air Force and assume greater responsibilities; however, his career was completely derailed because of his Article 15 and referred OPR from 1995. The applicant clearly learned from his mistakes as a junior officer and proved he was a valuable asset to the Air Force. Unfortunately, the unfavorable information retained in his military records was used as a basis to deny his promotion to lieutenant colonel. Even had the Article 15 been properly removed from his OSR, the allied referral OPR would certainly have referenced the Article 15. As such, he has been a victim of both a material error and injustice that caused him undue prejudice and his Air Force career. He seeks to rectify this inequitable action and receive the promotion he should have earned in 2011. In light of these arguments, he requests retroactive promotion to lieutenant colonel and removal of his nonjudicial punishment from his military records. The applicant's complete response is at Exhibit E.

FINDINGS AND CONCLUSION

1. The application was not timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, to include his rebuttal, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendation of ARPC/PB and finds a preponderance of the evidence does not substantiate the applicant's contentions. Therefore, the Board recommends against correcting the applicant's records. The nonjudicial punishment action was removed from the applicant's OSR and his record met the SSB for the CY09 Air Force Reserve Participating Reserve Line Lieutenant Colonel Promotion Selection Board, in accordance with AFBCMR directive, dated 5 Nov 10. While the Board previously directed removal of the Article 15 from the applicant's OSR, there is insufficient justification presented to support removal from his master personnel record. Furthermore, the directed removal of the nonjudicial punishment from the applicant's OSR was based on administrative disposition, not on the merits of the action. Therefore, the OPR that was referred due to the actions for which the applicant received the Article 15 remains valid and there is no evidence presented to this Board to justify its removal. Finally, if the applicant had intended to

request removal of the referral OPR at that same time, he must have first exhausted the ERAB process prior to applying to the AFBCMR, in accordance with AFI 36-2401. The applicant has provided no evidence he exhausted the ERAB process or previously requested removal of the referral OPR through the AFBCMR. The Board also notes the applicant did not file the application within three years of discovering the alleged error or injustice, as required by Section 1552 of Title 10, United States Code, and DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*. The Board does not find it in the interest of justice to waive the three-year filing requirement and finds the application untimely.

RECOMMENDATION

The Board recommends informing the applicant the application was not timely filed; it would not be in the interest of justice to excuse the delay; 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 DAFI 36-2603, paragraph 2.1, considered Docket Number BC-2022-02815 in Executive Session on 14 Dec 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 11 Oct 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, ARPC/PB, w/atchs, dated 2 Dec 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Counsel, dated 19 Dec 22.
- Exhibit E: Counsel’s Response, dated 30 Mar 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

Board Operations Manager, AFBCMR