

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02849

XXXXXXXXXX

COUNSEL: XXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Letter of Admonishment (LOA), dated 14 Apr 22, be removed from his Officer Selection Record (OSR).

APPLICANT'S CONTENTIONS

He received an LOA by his group commander for violating aircraft aviation rules. His wing commander then convened a Flying Evaluation Board (FEB) which determined that while he lacked judgment, he did not intentionally violate aircraft regulations and recommended that the wing commander review and remove the LOA.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 14 Apr 22, according to the *Letter of Admonishment*, dated 14 Apr 22, issued by his special operations group commander (SOG/CC), he was admonished for an unauthorized and unplanned formation flight, a dangerous violation of flight discipline that compromised the safety of both aircraft and crews and which behavior constitutes a dereliction of duty under the Uniform Code of Military Justice (UCMJ) Article 92.

On 18 Apr 22, the applicant submitted a written response to the SOG/CC requesting that the LOA be downgraded to a Letter of Counseling (LOC) due to the ambiguities surrounding the issue and that an LOA would trigger a mandatory note in his OSR and may disproportionately impact his promotion board.

On 21 Apr 22, the SOG/CC, upon considering the applicant's response, decided to sustain the LOA and advised that it will be filed in the applicant's OSR and Unfavorable Information File (UIF).

On 7 Sep 22, according to the memorandum for the special operations wing commander (SOW/CC), *Flying Evaluation Board (FEB) Conclusions*, provided by the applicant, the FEB recommended the SOW/CC review and remove the LOA citing that the evidence presented during the FEB demonstrated the prohibition against formation flying was not an established standard, as defined by AFI 36-2907, paragraph 1.1, which states "adverse administrative actions are intended to improve, correct, and instruct subordinates who *violate* established Air Force standards whether on or off duty (emphasis added)", and that "the Board believes that [the applicant] LOA serves no rehabilitative purpose and in fact incorrectly punishes [the applicant] for what best can be described as a community-wide, unestablished standard."

On 10 Oct 22, according to the memorandum, *Recission of Letter of Admonishment*, provided by the applicant, the SOW/CC informed the applicant he was granting the applicant's request, IAW AFI 36-2907, paragraph 2.4.6.1 and directing that the LOA be rescinded, which will remove it from the applicant's PIF and UIF, and that he will be replacing the LOA with a Letter of Counseling.

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

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 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.
2. Approved court-martial findings of guilt (Court-martial Orders).
3. Non-judicial punishment pursuant to Article 15, Uniform Code of Military Justice.
4. Letters of Reprimand.
5. Letters of Admonishment.
6. Notices of Relief of Command (for cause).
7. Letters of Counseling related to a substantiated adverse finding or conclusion from an officially documented investigation or inquiry.

LOCs unrelated to a substantiated finding or conclusion from an officially documented investigation or inquiry will not be considered adverse information. This preserves commanders' ability to administratively document and rehabilitate minor instances of substandard behavior or misconduct without making it a part of the permanent record (also referred to as "standalone" LOCs).

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.

Air Force Instruction (AFI) 36-2907, *Adverse Administrative Actions*, 22 May 20:

2.3.3. Letter of Counseling (LOC). Administrative censure for violation of standards. The intended outcome of an LOC is to help Airmen use good judgment, assume responsibility, understand, and maintain standards, and face and solve problems. Generally, this is a form of corrective action appropriate for correcting habits or shortcomings not necessarily criminal or illegal, but which can ultimately affect job performance, work center morale, and discipline.

2.3.4. Letter of Admonishment (LOA). Administrative censure for violation of standards which is more severe than a RIC and LOC. It could be used to document a first offense or address behaviors not corrected through counseling. Do not use it when a reprimand is more appropriate. For officers, if not filed in the UIF, an LOA must be filed in the individual's PIF.

2.4.6. Rescinding RICs, LOCs, LOAs or LORs documents contained in a PIF or a UIF. The individuals listed in paragraphs 2.1 and 4.4.1 through 4.4.6 of this instruction, if equal to or senior in grade to the initial imposing authority, may rescind RICs, LOCs, LOAs or LORs upon his or her own initiative or upon a request from the member if the member is within their command. These individuals may rescind RICs, LOCs, LOAs or LORs only in the following circumstances: If the appropriate authority determines more or less severe action is warranted.

AIR FORCE EVALUATION

AFPC/DPMSM, recommends granting the applicant's request. Based upon the documentation provided by the applicant and analysis of the facts there is evidence of an error or injustice. The applicant's wing commander, upon review on the FEB's findings and recommendations, decided to rescind the LOA.

The LOA meets the requirements of Title 10, United States Code, Section 615, *Information furnished to selection boards*, paragraph (a)(3), In the case of an eligible officer considered for promotion to a grade specified in subparagraph (B), any credible information of an adverse nature, including any substantiated adverse finding or conclusion from an officially documented investigation or inquiry, shall be furnished to the selection board in accordance with standards and procedures set out in the regulations prescribed by the Secretary of Defense pursuant to paragraph (1). As such, the LOA was filed in the applicant's MPerGrp and OSR.

In accordance with DAFI 36-2907, 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.

Additionally, in accordance with Department of the Air Force Policy Memorandum (DAFPM) 2021-36-03, *Adverse Information for Total Force*, Attachment 1, 2. Section II, d, Approved court-martial findings of guilt are retained in the OSR permanently unless the findings are overturned on appeal or set aside in their entirety, and the member is not subsequently found guilty at a rehearing or new trial. If removed from the OSR for this reason, this is not considered

adverse information and will not be filed in the MPerRGp. All other adverse information filed in the OSR will remain in the OSR: For O-6 and below boards and processes for ten years, except for substantiated conduct, any single act of which, tried by court-martial, could have resulted in the imposition of a punitive discharge and confinement for more than one year. If the exception is met, the adverse information will remain in the OSR. Except for the set aside of a court-martial or nonjudicial punishment action, earlier removal of adverse information from the OSR may only be directed pursuant to an AFBCMR recommendation.

However, after the LOA was issued a Flying Evaluation Board was convened and recommended to the applicant's wing commander that the LOA be reviewed and rescinded due to its severe nature and ramifications. The wing commander, upon review of the FEB's findings and recommendation, then decided to rescind the LOA and replace it with an LOC.

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 18 Jan 23 for comment (Exhibit D), 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 the victim of an error or injustice. The Board concurs with the rationale and recommendation of AFPC/DPMSSM and finds a preponderance of the evidence substantiates the applicant's contentions. The Board agrees with the findings and recommendation of the Flying Evaluation Board and finds that the applicant's wing commander acted within his authority by rescinding the LOA and issuing an LOC. Therefore, the Board recommends correcting the applicant's records as indicated below.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to reflect that the Letter of Admonishment, dated 14 Apr 22, was rescinded and that it be removed from his Officer Selection Record (OSR), Master Personnel Records Group (MPerRGp), Automated Records Management System (ARMS) record, and Unfavorable Information File (UIF).

CERTIFICATION

The following quorum of the Board, as defined in Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2022-02849 in Executive Session on 7 Mar 23:

- , Panel Chair
- , Panel Member
- , Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 27 Oct 22.

Exhibit B: Documentary evidence, including relevant excerpts from official records.

Exhibit C: Advisory opinion, AFPC/DPMSSM, dated 17 Jan 23.

Exhibit D: Notification of advisory, SAF/MRBC to applicant, dated 18 Jan 23.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9.

X

Board Operations Manager, AFBCMR