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

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**RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2022-02878

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**COUNSEL:**

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**HEARING REQUESTED:** Work-Pr...

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**APPLICANT'S REQUEST**

His military records be updated to reflect retirement as colonel (O-6).

**APPLICANT'S CONTENTIONS**

He was wrongly held responsible for one disgruntled staff member of the unit despite having excellent performance reports and recommendations from two general officers that he be retired in the grade of O-6. He was never properly served copies of the evidence used against him in the Officer Grade Determination (OGD). A casual review of his record and documentation reveals he served successfully in the grade of O-6 and should be retired as such.

The applicant's complete submission is at Exhibit A.

**STATEMENT OF FACTS**

The applicant is an Air National Guard lieutenant colonel (O-5), who retired as an O-5 as a result of an OGD conducted in accordance with 10 U.S.C., Section 1370.

On 19 December 2019, according to a Report of Investigation, a complaint against the applicant was filed alleging the applicant restricted personnel of the unit from talking to the Inspector General (IG) in violation of Title 10 USC 1034 (a), DoDD 7050.06, *Military Whistleblower Protection*, (3.b.), and AFI 90-301, *Intelligence Oversight*, (Chapter 7.3.1.).

An IG investigation into the allegation was conducted from 13 February 2020 to 3 April 2020.

On 2 April 2020, the applicant, then an O-6, was notified of OGD proceedings to which he acknowledged receipt of that same day. According to MTNG 3070, *Record of NonJudicial Punishment Proceedings*, provided by the applicant, the applicant also received notification of the commander's intent to administer Non-Judicial Punishment (NJP) under [State] code for violation of Article 92 and Article 107, of the Uniform Code of Military Justice (UCMJ).

On 6 April 2020, the applicant acknowledged receipt of the commander's intent to administer NJP and the applicant responded to receipt of the Article 92 allegations. The applicant through counsel requested dismissal of the Article 107 allegations.

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On 17 April 2020, the investigating officer concluded the allegation against the applicant was substantiated and recommended the commander take appropriate administrative/disciplinary action regarding the substantiated finding.

On 30 April 2020, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, the applicant retired in the grade of Colonel (O-6).

On 11 May 2020, the Chief, Oversight Branch, Whistleblower Reprisal Investigations approved the investigating officer's conclusions and recommendations.

On 21 May 2020, According to MTNG 3070, the applicant received NJP for violation of Article 92 of the UCMJ and a written reprimand. The applicant was also notified of the consideration of additional information in the OGD proceedings.

On 29 May 2020, the applicant submitted supporting information for the OGD proceedings.

On 2 September 2020, the Secretary of the Air Force Personnel Council (SAFPC) considered the applicant's OGD. Based on the applicant being the subject of substantiated adverse findings from two officially documented investigations, receiving NJP and a reprimand, SAFPC found the applicant did not serve satisfactorily in the grade of O-6 but did serve satisfactorily in the grade of O-5.

On 25 September 2020, the SECAF's delegee adopted the recommendation of SAFPC and signed an instrument retiring the applicant in the lower grade of O-5.

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

## AIR FORCE EVALUATION

On 3 October 2023, SAF/MRBP (Personnel Council) recommended denying the application. The Air Force Personnel Board (AFPB) considered the applicant's OGD request on 2 Sep 20. It was a mandatory OGD pursuant to Air Force Instruction 36-3203, *Service Retirements*, paragraphs 7.6.3.4, 7.6.3.5, and 7.6.3.6 based on the applicant being the subject of substantiated adverse findings from two officially documented investigations, receiving nonjudicial punishment (NJP) under [State] code, and a reprimand, while holding the grade of O-6. The record demonstrates the applicant received notice of and provided a response to the OGD action before AFBP consideration. The AFBP, after consideration of the case, recommended retirement in the lower grade of O-5 based on a finding that the applicant did not serve satisfactorily in the grade of O-6. The AFBP specifically found that, on balance, the five mandatory factors did not weigh in favor of satisfactory service. On 25 Sep 20, the Secretary of the Air Force (SECAF)'s delegee adopted that recommendation and signed an instrument retiring the applicant in the lower grade of O-5. Other than his own assertions, the applicant has provided no evidence indicating the decision in his OGD was somehow an error or injustice.

The Air Force lawfully and rationally conducted the OGD leading to the determination that the applicant's service in the grade of O-6 was not satisfactory. The AFBP reviewed all five mandatory factors and concluded that these factors did not support a finding of satisfactory service. A review of the case file revealed no evidence that the applicant's case did not receive fair consideration in line with governing service regulations. In finding the applicant's service in the

grade of O-6 was not satisfactory, the AFPB considered the record evidence, including the applicant's record of performance, multiple investigative findings confirming misconduct by the applicant, the underlying evidence related to the applicant's NJP, Letter of Reprimand), and the applicant's responses thereto. Notably, the AFPB acknowledged that the Commander-Directed Investigation (CDI) and Inspector General (IG) reports documented serious misconduct, such as dereliction of duty as a commander and efforts to restrict individuals from communicating with the IG. These findings strongly weighed against a satisfactory service determination. Furthermore, the AFPB recommendation was consistent with similar past cases involving comparable misconduct and was appropriate considering the nature of the applicant's actions. While the record did not show unanimous support from the chain of command, both the Adjunct General, Montana National Guard, and the Director of the Air National Guard recommended the applicant's retirement at the lower grade of O-5.

The applicant's objections largely revolve around disputing the merits of the AFPB's decision and reiterating arguments that had been previously addressed and dismissed. Other than these uncorroborated assertions, the applicant has presented no evidence that would undermine the adjudication of his case before the AFPB or the ultimate decision by the SECAF's delegee. The record demonstrates that the AFPB took the applicant's responses to the substantiated misconduct into account when evaluating whether he had served satisfactorily. Specifically, the applicant during the OGD process raised concerns about several findings and presented his version of events and his perspective on the misconduct. The AFPB had access to this viewpoint when deliberating on the case but ultimately did not find it persuasive. The Air Force's OGD determination in the applicant's case was both rational and supported by substantial evidence, and it did not violate any laws or regulations. The AFPB considered and appropriately weighed all the evidence on record and reached a well-reasoned conclusion in line with legal and regulatory standards. Therefore, the evidence presented by the applicant is not sufficient to conclude the AFPB's recommendation, or the ultimate decision by the SECAF's delegee, represents an error or injustice.

The complete advisory opinion is at Exhibit C.

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

The Board sent a copy of the advisory opinion to the applicant on 3 October 2023 for comment (Exhibit D), and the applicant's counsel replied on 28 October 2023. In his response, counsel contended the advisory opinion is noteworthy for its lack of depth and failure to analyze the unique circumstances of the case. It simply outlines procedural steps and concludes that since these procedures were followed, the decision is justified. The advisory opinion dismisses issues and errors raised by the applicant's counsel as uncorroborated assertions, despite the fact that counsel was not retained until after the initial decision was made. The advisory opinion also fails to address the timing of the OGD initiation, which suggests a bias against the applicant by new leadership. Additionally, it misrepresents facts regarding serious misconduct documented in reports, assuming all procedural steps were followed, when in fact the applicant was denied the opportunity to contest the conclusions of a Commander-Directed Investigation. Counsel urges the board to carefully review the facts and not rely solely on the advisory opinion, as it fails to address procedural irregularities that could lead to a manifest injustice. Given the numerous procedural errors in the case, counsel argues for the applicant to be retired in the grade of O-6, in which he successfully served.

The applicant's complete response is at Exhibit E.

## **ADDITIONAL AIR FORCE EVALUATION**

On 24 June 2024, SAF/MRBP (Personnel Council) recommended denying the application. The applicant claimed that a memo obtained via the Freedom of Information Act showed legal error because he was not allowed to review or contest allegations before the OGD adjudication. However, this claim was dismissed as unfounded. The board considered only evidence the applicant had already received and responded to during the OGD process. He was notified twice, on 2 April 2020 and 21 May 2020, each time receiving evidence related to the allegations. This evidence consisted of 58 pages from a CDI and 13 pages from an Inspector General (IG) investigation, totaling 71 pages. These were the same materials reviewed by the AFPB, and the applicant had them before his OGD response.

In his response, the applicant addressed the CDI allegations and disputed the findings, referencing his previous Non-Judicial Punishment response. He did not claim at any point that he lacked necessary evidence to respond adequately.

The complete advisory opinion is at Exhibit F.

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

The Board sent a copy of the additional advisory opinion to the applicant on 2 Jul 24 for comment (Exhibit G), and the applicant's counsel replied on 23 July 2024. In his response, counsel contended the advisory opinion dated 24 June 2024, with a redacted signature block, follows the same procedural format as the earlier advisory opinion dated 28 October 2023, signed by JKV. Both opinions fail to address a significant legal error identified in an internal memorandum dated 27 August 2020. The memorandum asserts the Board could only review the CDI if the applicant had been given the CDI, which, according to the CDI, the applicant was not. The 24 June 2024 advisory opinion does not address the issue the applicant did not have an opportunity to respond to the CDI before its review by the Board, nor does it rectify the fundamental due process violation. Additionally, it overlooks the OGD was served before the applicant could respond to the Article 15 and contest the allegations, leading to a prejudicial "guilt first then trial" situation. Counsel urges the AFBCMR to review the initial brief and advisory opinion responses and determine the applicant's due process rights were significantly violated, recommending the applicant be retired at the grade of O-6.

The applicant's counsel's complete response is at Exhibit H.

## **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 SAF/MRBP and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Air Force lawfully and rationally conducted the OGD leading to the determination that the applicant's service in the grade of O-6 was not satisfactory. The AFPB reviewed all five mandatory factors and concluded that these factors did not support a finding of satisfactory service. A review of the case file revealed no evidence that the applicant's case did not receive fair consideration in line with

governing service regulations. The applicant has presented no evidence that would undermine the adjudication of his case before the AFPB or the ultimate decision by the SECAF's delegee. Therefore, the Board recommends against correcting the applicant's records.

## RECOMMENDATION

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

## CERTIFICATION

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2023-01412 in Executive Session on 12 September 2024:

Work-Product, Panel Chair

Work-Product, Panel Member

Work-Product, Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 25 Apr 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, SAF/MRBP, 2 Oct 23.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 3 Oct 23.
- Exhibit E: Applicant's Response, w/atchs, dated 28 Oct 23.
- Exhibit F: Supplemental Advisory Opinion, SAF/MRBP, w/atchs, dated 24 Jun 24
- Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 2 Jul 24.
- Exhibit H: Applicant's Response, w/atch, dated 23 Jul 24.

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.

4/29/2025

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Board Operations Manager, AFBCMR

Signed by: USAF

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