

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

Work-Product

**RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2022-03098

Work-Product

**COUNSEL:** Work-Product

**HEARING REQUESTED:** NO

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**APPLICANT'S REQUEST**

The Adverse Information Summary (AIS) from his Master Personnel Records Group (MPerRGp) and his Officer Selection Record (OSR) be removed.

**APPLICANT'S CONTENTIONS**

The findings and conclusion of the CDI are inaccurate, and therefore the AIS should be removed from his records. Specifically, the CDI did not apply the correct standards per AFI 36-2502, *Enlisted Airman Promotion Demotion Program*, when the Investigation Officer (IO) concluded that he violated paragraph 8.5.1, by moving an incumbent member out of a master sergeant (E-7) slot on the Unit Personnel Management Roster (UPMR) by concluding any movement of a member into a non-promotable position violates this paragraph. However, this is not correct as the correct interpretation of paragraph 8.5.1 refers to a movement to an overage only.

Furthermore, he has evidence from HAF/Reserve Personnel Policy stating he did not violate AFI 36-2502, which includes; a memo from AFRC/A1P stating the individual was ineligible to be considered for promotion; emails, from the Force Support Squadron (FSS), stating the individual was never moved into an overage position and is therefore not eligible for promotion; and AF Form 1411, *Extension or Cancellation of Extensions of Enlistment in the Regular Air Force (REGAF)/Air Force Reserve (AF RESERVE)/Air National Guard (ANG)*, signed by an individual, requesting enlistment extension to 30 Nov 20, which made the individual ineligible to be considered for promotion. He submitted these documents, along with his request for reconsideration of the Command Directed Investigation (CDI), to the ARW/CC, who subsequently denied his request.

The applicant goes onto provide the following illustrative example of the correct interpretation:

There are two Airmen assigned to a single position (e.g., an authorized E-7 position, with an E-7 projected to retire, separate, or to be re-assigned, and a technical sergeant (E-6) overage). Paragraph 8.5.1 states that a commander cannot move the E-7 assigned to the E-7 position or move the E-7 as an overage in another or current position, to promote the E-6. The intent being to avoid Airman being moved around to try and circumvent the promotion policy (e.g., have two E-7s when only one is authorized).

This correct interpretation is substantiated by Air Force Reserve Directorate of Personnel (REP/A1PP) who stated "Based upon the fact that individuals were incumbent in their own positions 8.5.1 would not apply. This only applies to overage situations. It clearly states in the last sentence "do not move the incumbent as an overage in another or current position for the purpose of promoting the Airman assigned." Again, neither member was considered to be an overage in

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this case. As the commander you have the authority to make internal UPMR changes for leveling, readiness and development purposes. Also, both assignment actions and promotion eligibility determinations fall within the authority of the commander.”

Moreover, on 16 Apr 21, AFI 36-2502, dated 12 Dec 14, (Change 2, dated 14 Oct 16), was superseded and paragraph 8.5.1 was changed to clarify the intent, which further demonstrates the CDI’s legal analysis was wrong, by deleting the sentence “Do not change an incumbent position number or move current incumbent as an overage in another or current position for the purpose of promoting the new Airman Assigned.”

Additionally, contrary to the CDI conclusion that he negatively impacted a member who was eligible to promote, AF Form 1411, signed by the individual, shows their enlistment went through 11 Nov 20. In this regard, AFI 36-2502, paragraph 8.4.11, states that a member must have 24-months of retainability before that member can be considered for promotion to E-7. The individual did not have 24 months of retainability, and the individual had expressed to him his intention to retire from the Air Force Reserve.

Given the information above, he believes the AIS is a misrepresentation of his character and will negatively impact his career in the Air Force Reserve.

The applicant’s complete submission is at Exhibit A.

#### **STATEMENT OF FACTS**

The applicant is an Air Force Reserve major (O-4).

According to the documents provided by the applicant:

Between 22 Nov 21 and 19 Jan 22, the applicant through the Area Defense Counsel (ADC), contacted the ARW/CC inquiring on the status of the applicant’s request for reconsideration of the CDI naming allegations. The ARW/CC responded to each inquiry and on 19 Jan 22, the applicant was informed the CDI would not be reopened as the CDI naming allegations will stand.

On 21 Jan 22, according to memorandum, *Substantiated Investigation Without Written Command Action*, dated 21 Jan 22, the applicant was notified by his wing commander that a CDI, dated 23 Oct 20, resulted in substantiated findings and this memorandum, the AIS and the applicant’s comments would be filed in both his MPerRG and OSR. Specifically, the Investigation Officer (IO) found that the applicant abused his authority and was negligently derelict in his duty to comply with AFI 36-2502, paragraph 8.5.1 when he moved an incumbent out of a master sergeant slot on the unit manning roster for the purpose of promoting another technical sergeant to master sergeant. The position move was an abuse of authority because the move negatively impacted the incumbent who was eligible to promote, and the move was executed in violation of AFI 36-2502. Additionally, inasmuch as he believed the incumbent was ineligible for promotion, his action was negligent because, as the commander, he had an obligation to verify promotion eligibility before changing the incumbent’s position on the unit manning roster.

On 21 Jan 22, the applicant acknowledged receipt of the AIS and that he had 45 calendar days to provide a response.

On 6 Mar 22, in an e-mail to the ARW/CC, the applicant requested an extension that accommodates the length of the FOIA request, and the time for the AF Personnel Policy to provide an accurate interpretation of AFI 36-2502, paragraph 8.5.1.

On 8 Mar 22, the ARW/CC replied, keeping the extension limited to 28 March with the comment, “The CDI is not being filed on your OSR. You are responding to the AIS, which you have had for over 45 days, and will have had for over two months by the new suspense date.”

On 28 Mar 22, according to memorandum *Response to Notice of Adverse Information Summary*, dated 28 Mar 22, the applicant responded and contended that the CDI did not apply the correct standards per AFI 36-2502.

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

### **APPLICABLE AUTHORITY/GUIDANCE**

Department of the Air Force (DAFI) 36-2907, DAFGM 2022-01, *Department of the Air Force Guidance Memorandum*, dated 27 Apr 22, to AFI 36-2907, *Adverse Administrative Actions*, 3. SECTION III: *Additional Information Pertinent to Officially Documented Investigations or Inquiries*:

a. In the event that an officially documented investigation or inquiry concludes with a substantiated finding and a commander (or equivalent) decides not to issue written command action, to include verbal counseling, the findings and the commander’s decision must still be documented and filed in the MPerRG and OSR via a Memorandum for Record (MFR) and Adverse Information Summary (AIS). The AIS must include the following:

- (1) Grade and Position at time of allegation.
- (2) Summary of what the officer did.
- (3) Investigating Agency.
- (4) Findings.
- (5) Date Findings Approved.
- (6) Command Actions taken (e.g., verbal counseling or no command action).
- (7) Reason for Command Action (or no command action).

b. The subject officer will be provided a copy of the MFR and AIS and will be afforded an opportunity to submit written comments in response to the documents before they are filed in the OSR. The MFR and the officer’s comments (if any) will be sent to SAF/IGQ, in accordance with AFI 90-301, *Inspector General Complaints Resolution*, Tables 4.4, 7.1, and 8.2, and to the member’s MPF, CSS, or equivalent personnel support function for inclusion in the MPerRG and OSR.

AFI 36-2502, *Enlisted Airman Promotion Demotion Program*, dated 12 Dec 14, (Change 2, dated 14 Oct 16), paragraph 8.5.1. An Airman assigned as an overage to a position projected for vacancy (due to retirement, separation, or reassignment of the incumbent) becomes eligible for promotion in the promotion cycle after the incumbent physically retires, separates or is reassigned and member drops off files, provided all other promotion eligibility criteria are met. Do not change incumbent position number or move current incumbent as an overage in another or current position for the purpose of promoting the new Airman assigned.

8.4. Ineligibility for Promotion. AFRC [Air Force Reserve Command] will suspend promotion to any grade or grades if AFRC determine that the assigned strength in a particular grade or grades will exceed the number authorized. The following circumstances preclude promotion: 8.4.11.

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Airmen (E-6 through E-8) that are within 24 months of HYT. (Note: Members must have 24 months retainability before being considered for promotion to E-7 through E-9).

AFI 36-2502, 16 Apr 21, paragraph 8.5.1. An Airman assigned as an overage to a position currently filled becomes eligible for promotion in the promotion cycle after the incumbent physically retires, separates or is reassigned provided all other promotion eligibility criteria are met.

AFI 36-2110, *Total Force Assignments*, dated 5 Oct 18, paragraph 8.7.13.1.1, Advise the member in writing of the overage status by the commander or RIO Det/CC with the information in Attachment 19. For personnel in the unit program, file a copy of the overage approval and the members' acknowledgement in the members' personnel record or in the MPF Career Development Element files.

8.7.16. Anticipated Losses. When an individual is a projected loss (retirement, separation, reassignment, relocation, etc.) an overage can be established against his or her position not to exceed 1 year prior to the effective loss date, i.e., retirement effective date, ETS expiration date, or the anticipated relocation date. In such cases, the overage code applies to the member projected as a loss.

Department of the Air Force Manual (DAFMAN) 1-101, *Command Directed Investigations*, 9 Apr 21:

1.4. Standard of Proof. The standard of proof for a CDI is preponderance of the evidence. A preponderance of the evidence is defined as the greater weight of credible evidence. When the greater weight of credible evidence supports the alleged events, it means the events as alleged are more likely than not to have occurred and the IO may consider the events proven. While the amount of evidence is something to consider, less credible evidence will not trump a smaller amount of more credible evidence. Some additional things to consider when weighing the evidence are witness demeanor, opportunity for knowledge, bias, motive, intent, and the ability to recall and relate events. At all times, IOs must use their own common sense, life experiences, and knowledge of the ways of the world to assess the credibility of witnesses they interview, and the evidence gathered in the investigation.

Chapter 7, *Post Report Actions*, Paragraph 7.4. CDI Reconsideration. CDIs are a function of command, and requests for reconsideration are likewise the responsibility of the chain of command. Simply disagreeing with the findings or with the command action taken in response to the findings is not sufficient reason to justify a higher-level review or additional investigation. It is the requestor's responsibility to provide new and compelling information, including specific reasons why they believe the original complaint resolution was not valid or adequate, that justifies a higher-level review on previously considered issues. Requests for reconsideration should be addressed to the initiating commander and thereafter the next echelon of command. Military members may apply to the Air Force Board for Correction of Military Records pursuant to AFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)* for relief. Military members may also be able to use Article 138, Uniform Code of Military Justice, to request redress from the commander and General Court-Martial Convening Authority (see AFI 51-505, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice*).

**AIR FORCE EVALUATION**

AFRC/JA recommends denying the request. The applicant contends he has proof that contradicts the substantiated findings of the CDI, outlined in the AIS, and therefore the AIS should be removed

from his records. However, they recommend the substantiated findings stand and full denial of the requested relief as they find no such proof.

The ARW/CC notified the applicant that a CDI resulted in substantiated findings and an AIS would be filed in both his MPerRG and OSR; however, the ARW/CC did not take any adverse actions against him as a result of the substantiated allegations findings. In summary, the substantiated allegations found the applicant abused his authority when he directed the assignment action placing the original incumbent into an overage status and that he was derelict in his duty as he failed to comply with AFI 36-2502 when he removed the incumbent from one position and assigned that member another position, despite the original incumbent being eligible to promote. Once reassigned and the position was vacant, he then assigned another member to the vacant position, thus allowing that member to promote. The newly assigned member had been in an overage status prior to the reassignment. Although the IO substantiated the allegations of being derelict in his duties, the ARW/CC stated while the applicant believed that the original incumbent was ineligible to promote at the time he took the reassignment actions, he was, however derelict in his duties as he failed to verify the original incumbent's eligibility for promotion prior to reassigning to a lower graded position.

The applicant requested reconsideration of the CDI's substantiated findings pursuant to AFMAN 1-101, paragraph 7.4 claiming that he did not take the reassignment actions to circumvent the promotion policy and stating that neither airman was in an overage status. Furthermore, he claimed the original incumbent, in addition to not having the requisite retainability to be eligible for promotion, expressed an intent to retire. To support his claims, he provided an e-mail from AF/A1P, which stated since both airmen were in their own positions as incumbents (and not overages), paragraph 8.5.1 would not apply. In addition, the ADC also provided a legal analyses contending that neither allegation should have been substantiated based on the new information brought forward by the applicant in his request for reconsideration by arguing that; the original incumbent was not eligible to promote and therefore not adversely affected by the assignment action; and that the applicant's actions were in compliance with AFI 36-2502 and that he acted within his authority as commander to manage the Unit Manning Document. As such, the IO had erroneously substantiated both allegations.

The applicant cites a change to AF 36-2502 to support his position. In the change, dated 16 Apr 21, AFI 36-2502, Chapter 8, paragraph 8.5.1 was revised to exclude language directing that incumbent position numbers should not be changed for the purposes of promoting new airmen assigned. However, this should not be considered at all, as only the instruction in *place at the time he took action* [emphasis added] is relevant as he could not, for obvious reasons, take action seemingly supported by guidance that was nonexistent at the time. Further, the applicant references an e-mail from AF/A1P which also cites paragraph 8.5.1, only in part, to support the applicant's actions. Both the applicant, and AF/A1P leave out the verbiage "do not change incumbent position number or..." This action is dismissed as "leveling" as cited by AF/A1P's e-mail as the applicant's actions were not of a leveling nature as he created an overage situation by reassigning the current incumbent into a E-7 position that was already occupied by an E-4, thus causing the E-4 to be in an overage status. This action resulted in the creation of a situation that leveling actions are supposed to eliminate.

In accordance with DAFI 36-2110, paragraph 9.7. *Undergrades, Overgrades and Overages*. 9.7.1 *Leveling Requirements*, Make internal realignments to reduce or eliminate undergrade, overgrade, or overage situations before making assignments. Encourage Airmen assigned as an overgrade/overage to work with wing career assistance advisors to find a valid vacant position or explore possible retraining opportunities. When manning situations develop that allow for elimination of overgrade/overage, the commanders (unit program) or RIO Det/CCs (IR program)

will initiate necessary personnel actions to eliminate the overgrade and/or overage. (T-2). Note: Approval of overgrade and overage conditions for officers and enlisted may impact on future promotion quotas.

Thus, AFRC/JA agrees with the IO's conclusion that the applicant authorized the assignment action that moved the original incumbent from the primary E-7 position to the primary E-6 position in order to allow newly assigned member (E-6) to occupy the E-7 position for the purpose of promoting. Regardless of the overage status of either member, the instruction at the time did not allow for reassignment of incumbents to different positions for the purpose of promoting new airmen. The applicant's actions were in direct contradiction to his claim that his actions were not taken to circumvent the promotion process and also in direct contradiction to AFI 36-2502, paragraph 8.5.1.

Additionally, the applicant claims that the original incumbent was not negatively impacted by the assignment action, as he was not eligible to promote and cites the original incumbent's Estimated Time of Separation (ETS) date at the time of the assignment action, lack of the 24-month retainability requirement, in addition to having an excused absence within 12 months of the promotion eligibility date. Having found no evidence in the record as provided that the current incumbent had any unexcused absences, only his lack of the requisite retainability will be addressed. The applicant provided an e-mail from AFRC/A1KK that states the promotion to E-7 requires two-years of retainability. However, AFRC/A1KK also states the following:

“...during the promotion eligibility determination steps, if a member did not “have the retainability [sic] but had all other requirements then the leadership would let the CAA and/or member know that in order to be fully eligible for promotion to the next rank on the date of eligibility the member would need to know to obtain appropriate retainability by either reenlisting or extending which would have to be at least 24 months past the date of promotion and have signed reserve service commitment (AF 64).”

Furthermore, AFI 36-2502, paragraph 8.11, contains the following language: “If the Airman is *unable* [emphasis added] to be obtain the full two-year retainability, he or she is not authorized promotion to the next higher grade.” Table 8.2 lends further weight in Note 1 for Rule 6, MSgt promotion requirements: “...For Airmen not recommended for promotion, the commander annotates the reason for non-recommendation and *notifies the individual in writing*” [emphasis added]. Both the AFRC/A1KK e-mail and AFI 36-2502 indicate that the member should be afforded the opportunity to obtain the requisite eligibility.

Finally, the record provided does not show that prior to the assignment action the current incumbent was notified or was otherwise afforded the opportunity to obtain the requisite retainability that would have (subject to promotion authority decision) allowed him to promote had he remained in the E-7 position, or show that the current incumbent was ineligible to reenlist or otherwise to obtain the requisite retainability.

Thus, the requested relief should be denied in full.

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 22 Feb 23 for comment (Exhibit D), and the applicant replied on 20 Mar 23. In his response, the applicant contended that he has not been given the opportunity for due process that DAFMAN 1-101, paragraph 7.4 provides.

Further, with the additional new evidence that he submits, he believes that the outcome of the CDI would have been different as neither the IO or the ARW/JA considered the current incumbents lack of retainability to promote compared to that of the newly assigned member; the contradiction in responses to both his and ARW/JA's inquiries from AF/REP, who provided different answers to the same CDI allegation. Finally, he asserts, as the commander, he made a decision that was in the best interest of the squadron and well within his authority. The supporting evidence clearly shows that the current incumbent was not negatively impacted because he was not eligible for promotion. Thus, the CDI allegations are not substantiated. As such, he requests that the AIS filed in his MPerRG and OSR be removed.

His actions did not violate AFI 36-2502.

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 AFRC/JA and finds a preponderance of the evidence does not substantiate the applicant's contentions. While the ARW/CC notified that applicant that a CDI resulted in substantiated findings and that an AIS would be filed in both his MPerRGp and OSR, the ARW/CC did not take any adverse actions against the applicant regarding the substantiated findings with the rationale that the applicant believed the original incumbent was ineligible to promote at the time of the reassignment actions. However, the ARW/CC determined that the applicant was derelict in his duties as he failed to verify the original incumbent's eligibility for promotion prior to reassigning. In accordance with DAFMAN 1-101, paragraph 7.4, CDIs are a function of command and request for reconsideration are likewise the responsibility of the chain of command. Simply disagreeing with the findings or with command action, is not sufficient reason to justify a higher-level review or additional investigation. Furthermore, it is the requestor's responsibility to provide new and compelling information why they believe the original complaint resolution was not valid or adequate that justifies a higher level review. In this regard, the evidence presented by the applicant is insufficient to overcome the IO's conclusion that the applicant authorized the assignment action that moved the original incumbent from the primary E-7 position to the primary E-6 position in order to allow a newly assigned member (E-6) to occupy the E-7 position for the purpose of promotion. Therefore, regardless of the overage status of either member, the instruction at the time did not allow for reassignment of incumbents to different positions for the purpose of promoting new airmen. Finally, the Board notes that the applicant should have protested the CDI findings in 2020 when the report was completed, not in 2022 when the AIS was required per policy. 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-2022-03098 in Executive Session on 20 Apr 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 27 Nov 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFRC/JA, w/atch, dated 15 Feb 23.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 22 Feb 23.
- Exhibit E: Applicant’s Response, w/atchs, dated 20 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.

7/18/2023

X *Work-Product*

Board Operations Manager, AFBCMR

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