

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-03135

XXXXXXXXXX

COUNSEL: XXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

Correct his official military record to reflect his retired grade as colonel (O-6), with full back pay from date of retirement.

APPLICANT'S CONTENTIONS

His retirement reduction was entirely based on one Inspector General (IG) investigation and the perception of harm. The IG allegations were not violations of Air Force policy or federal law, nor did they rise to the level warranting non-judicial punishment or court martial. Had he continued to serve rather than retiring, he would have continued in the grade of colonel (O-6). He indicated a desire to withdraw his request to retire and continue with another assignment. He only retired because he was assured he would retire as a colonel (O-6). He was misled and wishes he had kept serving.

Air Force Instruction (AFI) 36-3203, *Service Retirements*, paragraph 8.6. governs the rank and grade at which an officer retires and goes on to list the factors to be considered. The background and timeline provided by the applicant is vital in understanding the context surrounding the circumstances around his request for reconsideration.

In the Grade Board Decision Memo, they detailed their rationale. They determined the Referral Completion Report (RCR), dated Apr 19, substantiated allegations against him for verbal abuse, insubordination, and toxic leadership occurring between Jul 18 and Apr 19; however, it was not reviewed by the base legal office, so there was no confirmation of legal sufficiency. Consequently, the wing, nor the numbered/major command commanders used it as a basis for their recommendations. The Grade Board did likewise. He asks this Board to also not consider the RCR as it was not part of the Grade Board's decision or rationale. It is important that he highlight the multiple AFI violations surrounding the Commander Directed Investigation (CDI) and the RCR.

In accordance with AFI 90-301, *Inspector General Complaints Resolution*, paragraph 1.43.2.2., commander should, "refer to the CDI guide available on the SAF/IGQ portal website for guidance on conducting a CDI." The CDI was used improperly. The allegations investigated were not related to violations of law, regulations, or policy as stated in the CDI guide, paragraph 2.1.1.. Additionally, the CDI guide, paragraph 5.2.1.2. states the subject should be interviewed last, and he was never interviewed by the Investigating Officer (IO) [for the RCR], thus his rebuttal or statement was not provided to SAF/IGQ nor included in the investigative report. This is also a failure to collect evidence, in violation of paragraph 1.4.. The IO [for the RCR] appointed was an E-9, whereas the CDI guide, paragraph 3.3. states the IO should be of equal or higher rank. Further, the IO should be impartial, which he does not believe to be the case as he previously rejected hiring the IO as his Group Chief. If his leadership did not consider the RCR, he wonders why the report was included in the Officer Grade Determination package. Nevertheless, he was removed from command based off this report alone.

The IG investigation findings were the sole basis for the Grade Board's decision; therefore, he is providing additional information regarding each finding. The first allegation, that he denied the complainant favorable stratification resulting in a downgraded officer performance report (OPR), was substantiated; however, contrary to this substantiation, the IG stated there was no correlation between the protected communication and the personnel action due to the OPR's non-discretionary close out date six months after the protected communication. Additionally, he had no stratification to give as he only had two lieutenant colonels working for him. Of note, he did not give the other lieutenant colonel a stratification on his OPR either.

The second allegation, that he did not recommend the complainant for a Senior Development course was first unsubstantiated, then via amendment, substantiated. The rationale for the change was that while the evidence showed withhold of favorable endorsement was reasonable based on his assessment of the complainant's performance, that assessment was likely negatively influenced by the protected communication. The original finding was correct, and he does not believe his actions, which were reasonable according to the IG, should result in his retiring in a lower grade.

The third substantiated allegation, that he withheld a favorable personnel action in reprisal also noted there was substantial time between the protected communication and the personnel action. Additionally, he did in fact forward the personnel action as soon as he received it. He gave his recommendation based on his observations of the complainant's performance.

The fourth substantiated allegation states he restricted reporting of violations to the IG, referencing a secretly recorded conversation between him and the complainant, wherein he discussed handling matters at the lowest level. Of note, the IG also detailed the applicant encouraged the complainant to talk to whoever he wanted to and only asked for the courtesy of handling matters at the lowest level first, as is Air Force policy. It was not his intention to restrict anyone. According to the IG report, this allegation was substantiated because a reasonable person could have viewed the conversation as restrictive; therefore, is based on perception and not actual wrongdoing. Additionally, the same IG found no violations of any nature during the 2018 AETC/IG Unit Effectiveness Inspection.

The final substantiated allegation regarding the applicant's intention to take action against two IG complainants for potentially lying in their complaints to dissuade others from reporting violations was based on the perception, as illustrated on one witness's testimony. This conversation was taken completely out of context. He simply told his leaders that false statements should not be made to the IG. He never said anything about taking adverse action against anyone. Again, the IG report states that it was not his intention to restrict, but a reasonable person hearing the statement could perceive it as restricting.

Regarding the Grade Board's rationale, they noted his conduct had potentially long-lasting career impacts on the complainant. He is surprised his reduced retirement was based on potential impact, without any actual impact cited. Finally, there was no evidence of impact on military effectiveness as they passed the AETC/IG Unit Compliance Inspection with no findings of any violations.

His length and quality of service are reflected in his 29-year career, favorable evaluations, numerous accolades and letters of support. Finally, the Grade Board noted all members of his chain of command recommended his retirement in the lower grade, conflicting with the memorandum submitted by the Commander, **Work...** Training Wing **v** **W...** TRW/CC) advocating for his conditional retirement as a colonel (O-6).

Additionally, the applicant provided in support of his contentions, a list of grade determination outcomes received via a Freedom of Information Act request as comparison with his results. He

contended he never received a Letter of Reprimand, Letter of Counseling, Non-Judicial Punishment, or any other form of punishment. Yet because of an alleged reprisal, the only outcome being the perception of harm to one officer, he had his rank reduced.

In conclusion, the applicant understands his retirement was downgraded due to five substantiated IG allegations. As provided, allegations one and three were based on his honest assessment of the complainant's performance, and he provided evidence in support. Allegation 2 was not substantiated because no adverse personnel action was taken. Allegation 4 was based on a secretly recorded conversation where he emphasized Air Force policy on handling issues at the lowest level. The final allegation was affirmatively refuted by statements from individual witnesses.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force lieutenant colonel (O-5).

On 1 Aug 16, according to Special Order XXXXX, the applicant was promoted to the permanent grade of colonel (O-6).

On 31 May 19, according to Referral Completion Report (RCR), provided by the applicant, he was the subject of an inquiry conducted between 9 May 19 and 16 May 19 regarding allegations of insubordination, verbal abuse of subordinates, issuance of guidance in conflict with Work... Training Wing and Air Education and Training Command leadership, and facilitating a toxic work environment. All allegations, with the exception of issuance of conflicting guidance, were substantiated.

On 25 Jul 19, according to Air Education and Training Command Inspector General (AETC/IG) Report of Investigation (ROI), 17 May 19 – 22 Jul 19, the applicant was the subject of four of five substantiated allegations. The fifth allegation was amended from unsubstantiated to substantiated in an ROI addendum dated 12 Nov 19, provided by the applicant.

On 31 May 20, according to Special Orders No. XXXXX, dated 25 Feb 20, the applicant was relieved from active duty, organization, and station of assignment, with highest grade held on active duty of colonel (O-6), and retired effective 1 Jun 20 in the grade of lieutenant colonel (O-5)

On 31 May 20, the applicant was furnished an honorable discharge, in the grade of colonel (O-6), with Narrative Reason for Separation: Sufficient Service for Retirement, and credited with 29 years, 3 months, 18 days active service.

On 21 Dec 20, upon completion of an Officer Grade Determination, it was found the applicant did not serve satisfactorily in the grade of colonel (O-6) within the meaning of Section 1370(a)(1) of Title 10, United States Code; however, did serve satisfactorily in the grade of lieutenant colonel (O-5) within the meaning of the above provision and shall be retired in that grade.

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

APPLICABLE AUTHORITY/GUIDANCE

AFI 90-301, *Inspector General Complaints Resolution*, dated 28 Dec 18:

1.43.2. Commanders should:

1.43.2.2. Refer to the CDI guide available on the SAF/IGQ portal website for guidance on conducting a CDI.

Commander Directed Investigation (CDI) Guide, dated 1 Jun 18:

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 and quality of the credible evidence,” meaning the evidence indicates that one position is more probable than the opposing position. After weighing all the evidence, the IO may substantiate a finding when the greater weight or quality of the evidence points to a particular conclusion as more credible and probable than the reverse. While the amount of evidence is something to consider, non-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 may use their own common sense, life experiences and knowledge of the ways of the world to assess the credibility of witnesses they interview.

2.1.1. *Standards of Conduct.* CDIs may be used to investigate whether an individual has violated a standard defined by law, regulation, or policy. For example, military members and civilian employees must abide by the Joint Ethics Regulation. Air Force Instructions govern use of government computers and professional (or unprofessional) relationships. A CDI could be the appropriate tool to investigate whether conduct violated the applicable standard. Alternately, the law, regulation, or policy could provide the standard for an abuse of authority allegation.

3.3. *The Investigating Officer (IO).* If the investigation has named subjects, the IO should be equal or senior in grade to the most senior subject and not in their chain of command. In all cases, the IO should be mature and experienced with good writing and critical thinking skills. Generally, the IO will be a senior captain or higher, a civilian equivalent, or a senior NCO. With commander concurrence, the IO could be selected from a different unit. This may be prudent or necessary to ensure a fair and impartial investigation. IGs and their staff members are not eligible to be IOs for CDIs.²³ The IO should also be fully available to conduct the CDI unhampered by leave, temporary duty, separation, retirement or other commitments that would detract from the investigation. In complex cases, the commander might consider appointing an Assistant IO. All IOs should be trained to conduct thorough, fair and objective investigations. The IO has specific duties before, during and after the investigation.

5.2.1.2. *Order of Witnesses.* Each witness must be interviewed individually. The recommended sequence is: (1) the complainant(s); (2) subject matter experts; (3) regular witnesses; (4) subjects or suspects. Interviewing the subject last ensures the IO has learned the necessary information to ask the right questions. This process can also enhance truth telling, as people are more likely to be truthful if they know the IO has information from others. If the subject interview is last, the IO can also challenge any statements that are inconsistent with other evidence. Finally, interviewing the subject last allows the IO to advise the subject of all adverse information against them and decreases the need to re-interview.

Title 10, United States Code, Section 1370 (10 USC § 1370) – *Regular Commissioned Officers*

(a) *Retirement in Highest Grade in Which Served Satisfactorily.*

(1) *In general.* Unless entitled to a different retired grade under some other provision of law, a commissioned officer (other than a commissioned warrant officer) of the Army, Navy, Air Force, Marine Corps, or Space Force who retires under any provision of law other than

chapter 61 or 1223 of this title shall be retired in the highest permanent grade in which such officer is determined to have served on active duty satisfactorily.

AFI 36-3203, *Service Retirements*, 29 Jan 21:

8.6. *OGD in Conjunction with Retirement (10 USC § 1370 and 10 USC § 12771)*. An officer is not automatically entitled to retire in the highest grade held. Instead, an officer is retired in the highest grade in which the officer served satisfactorily (with sufficient TIG or a waiver) as determined by the SecAF or delegate. The SecAF or delegate will normally seek the review and recommendation of the SAFPC prior to making a determination of satisfactory service for an OGD in the case of any officer in the grade of O-6 or below who is seeking to retire.

8.6.2. The determination of “satisfactory” or “creditable” service in a particular grade is a matter of SecAF discretion.

8.6.2.1. Consideration of satisfactory or creditable service is not limited to the TIG required for the higher grade; rather, it includes the officer’s entire period of service in that grade.

8.6.2.2. In considering whether an officer has provided satisfactory or creditable service, the SecAF or delegate will consider the following: the nature and length of the officer’s improper conduct, the impact the conduct had on military effectiveness, the quality and length of the officer’s service in each grade at issue, past cases involving similar conduct, and the recommendations of the officer’s chain of command. In some cases, a single incident of misconduct can render service in a grade unsatisfactory despite a substantial period of otherwise exemplary service.

8.6.2.3. An OGD resulting in retirement in a lower grade is not punishment. It is an administrative action required by law that determines the highest grade in which an officer served satisfactorily.

8.6.3. *Initiating an OGD*. The unit commander or other appropriate authority must initiate an OGD when:

8.6.3.5. The officer, since the last promotion, has been the subject of any substantiated adverse finding(s) or conclusion(s) from an officially documented investigation, proceeding, or inquiry conducted by competent military or civilian authorities (except minor traffic infractions), regardless of the command action taken against the officer (if any). Examples of officially documented investigations, proceedings, or inquiries include, but are not limited to: command-directed investigations (CDIs); Inspector General (IG) investigations; and Equal Opportunity investigations.

AIR FORCE EVALUATION

SAF/MRBP recommends denying the application. The applicant’s arguments lack sufficient evidence to indicate the Air Force Personnel Board (AFPB) recommendation in this case, or the ultimate decision by SAF/MRB, represents an error or injustice, or that he has been treated differently than other similarly situated members.

The applicant faced a mandatory Officer Grade Determination (OGD) pursuant to 10 USC § 1370(a) and AFI 36-3203, paragraph 7.6.3.5. (sic). When an officer submits a retirement request, AFI 36-3203, paragraph 8.6.3.5, requires an OGD when an officer, since their last promotion, has been the subject of any substantiated adverse finding or conclusion from an officially documented investigation, proceeding, or inquiry by military or civilian authorities (except minor traffic infractions).

There are five factors to determine if an officer's service has been satisfactory pursuant to AFI 36-3203, paragraph 8.6.2.2.. These are the nature and length of the officer's improper conduct, the impact (if any) the conduct had on military effectiveness, the quality and length of the officer's service in each grade at issue, past cases involving similar conduct, and the recommendations of the officer's command chain. A single incident of misconduct can render service in a grade unsatisfactory despite a substantial period of otherwise exemplary service.

The applicant alleges he was misled by unnamed parties into thinking his retirement in the grade of colonel (O-6) was assured; however, only the Secretary of the Air Force (SecAF) and SecAF's delegee (SAF/MRB) had the authority to make that determination. He also raised concerns regarding the substantiated allegations and investigative process; however, his misconduct was substantiated after multiple levels of review. In Jul 19, a [REDACTED] TRW/CC-initiated investigation substantiated four of five allegations against the applicant. In Feb 20, AETC/IG and SAF/IGQ substantiated all five allegations. If the evidence had not supported the allegations or the procedures not properly followed, that would have been addressed at a level of higher review. Additionally, the applicant raised these issues in his OGD response, which was considered as part of the OGD deliberative process. Both the AFPB and SAF/MRB relied on the substantiated allegations as a basis for the OGD and as part of its deliberations. The RCR/informal inquiry was not part of the AFPB's basis for their recommendation due to concerns over legal sufficiency.

Further, the applicant addressed the five factors outlined in the AFPB decision memo. The AFPB gave varying weight to the factors based on specific details of the case, giving great weight to the chain of command's recommendations as they were closest to the situation. Finally, the applicant attempted to compare himself to other officers facing OGD; however, AFPB specifically noted there were no cases directly on point and the comparable misconduct cited by the applicant was devoid of details.

On 4 Dec 20, the AFPB adjudicated the applicant's OGD case. All members of the applicant's chain of command recommended the applicant be retired in the lower grade of lieutenant colonel (O-5). The AFPB unanimously concurred and recommended the applicant be retired in the lower grade, finding the applicant's "violations of federal law very troublesome, especially by a senior leader in the Air Force. The Board found these violations outweighed any positive contributions the [applicant] made as a Colonel." On 22 Dec 20, after a thorough consideration of the AFPB recommendation and the underlying facts and circumstances, SAF/MRB determined the applicant did not serve satisfactorily in the grade of colonel (O-6) within the meaning of 10 USC § 1370(a)(1) but served satisfactorily in the grade of lieutenant colonel (O-5) and retired him in that grade.

After a thorough review of this application, counsel's arguments or evidence provided were not sufficient to conclude that the applicant's records should be corrected as requested. As the applicant himself points out, an officer is not automatically entitled to retire in the highest grade held. He was formally investigated on very serious matters and all of the allegations were substantiated.

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 4 Apr 23 for comment (Exhibit D), and the applicant replied on 3 May 23. In his response, counsel, on behalf of the applicant contended the advisory opinion relies solely on the conclusions rendered by the investigation. The applicant implores the Board to review the facts as well as the hasty, incomplete, and inappropriately conducted investigation, contending an in-depth review of the facts will reveal erroneous conclusions that resulted in an improper and unjustified OGD.

The advisory opinion references there were no other OGD cases that were directly on point. That the applicant's case is unique further justifies a review of evidence/facts rather than reliance on previous conclusion which the applicant contends are incorrect. Further requested is the Board look at past decisions where officers were allowed to retire in their current grade and compare their misconduct to the applicant's, which did not result in any disciplinary action such as Article 15 or court-martial. The list of such cases of misconduct include: having an affair with a staff sergeant's wife; engaging in horseplay with a female captain in a hot tub while violating an MPO; using official TDY funds to do house hunting; punching an officer's bi-polar wife; intentionally lying about PT test on an OPR; driving while intoxicated; use of government Blackberry to contact escorts; wrongful drug use; DUI resulting in the injury of four children; touching female subordinates in a manner that made them uncomfortable; kissing spouse of officer under command; inappropriately touching a Marine lieutenant colonel at a party; inappropriately touching a lieutenant colonel on the breast; kissing women without consent; AWOL; grabbing buttocks of a subordinate's wife; posting classified information on Linked-In; drinking on duty; flipping-off and cursing at an O-5 in front of 30 subordinates; illicit affair with a female civilian's wife and violation of a no contact order; creating an unsafe environment resulting in the death of an Airman; sending sexually explicit emails to a noncommissioned officer; making unacceptable racial and sexually charged derogatory comments in front of subordinates; and inappropriately touching subordinates.

Assuming the applicant committed the substantiated misconduct, it is unjust for the listed cases of misconduct to result in no retirement grade reduction, while the applicant is retired in the lesser grade. The applicant's conduct, taken on its face, is largely based on perception with no actual harm done to anyone. The listed cases of misconduct, which resulted in no retirement reduction, involve actual serious illegal activity and serious harm to victims. While it is unclear why the applicant's chain of command turned their back on him, the Board should correct this injustice.

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, to include the applicant's rebuttal, 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. While the applicant contended the RCR process violated the guidance outlined in the CDI Guide, he later contended, and the advisory opinion confirmed, the RCR was not considered during OGD deliberation. Additionally, the applicant and the advisory opinion confirm the basis for the OGD was the five substantiated findings of the AETC/IG investigation. While the applicant disputes the validity of the allegations, AETC/IG and SAF/IGQ concurred with the findings, and the applicant's command chain recommended his retirement in the lower grade. Despite the applicant's input regarding other cases of misconduct with differing outcomes, the Board finds the AFPB gave appropriate consideration of the details specific to this case and did not treat the applicant differently than others similarly situated. 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-2022-03135 in Executive Session on 30 May 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 6 Jul 22.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, SAF/MRBP, dated 4 Apr 23.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 4 Apr 23.
Exhibit E: Applicant's Response, dated 3 May 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