

## **ADDENDUM TO RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

XXXXXXXXXXXXXX

**DOCKET NUMBER:** BC-2022-02637

**COUNSEL:** NONE

**HEARING REQUESTED:** YES

### **APPLICANT'S REQUEST**

The Board reconsider his request for the following:

1. The Letter of Reprimand (LOR), dated 24 Sep 19, be removed from his record.
2. His retired rank be changed to lieutenant colonel (O-5), and he receive full back pay from date of retirement.

### **RESUME OF THE CASE**

The applicant is a retired Air National Guard major (O-4).

On 15 Jun 23, the Board considered and denied his request to remove the LOR, dated 24 Sep 19, from his official military personnel record, his retired rank be changed to lieutenant colonel (O-5), and he receive full back pay from date of retirement, finding the applicant had provided insufficient evidence of an error or injustice to justify relief. The applicant acknowledged using familiar tones when communicating with his colleagues, having sexually explicit photographs of an enlisted member on his phone, and releasing Personally Identifiable Information data to an unauthorized person. While the applicant contended the information that supported the allegations of his misconduct was an invasion of his privacy by his former girlfriend, the Board found no evidence that she accessed and copied the applicant's personal data at the behest of the government or its agents. Further, the Board found the applicant's contention regarding the standard of proof for his LOR was moot. Finally, the applicant's assertions he received disparate treatment, and the LOR, referral officer performance report (OPR), and officer grade determination (OGD) were unjust or in error failed to sustain the burden of proof in accordance with Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*. The applicant was afforded due process for the LOR, and the OGD was found to be legally sufficient.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letter and Record of Proceedings at Exhibit H.

On 22 Dec 23, the applicant requested reconsideration of his request for his retired rank be changed to lieutenant colonel (O-5) from major (O-4). The applicant did not provide any relevant new evidence as required by DAFI 36-2603; therefore, the case was closed as non-viable, and the applicant was notified by letter.

The applicant's complete submission and letter of notification is at Exhibit I.

On 6 May 24, the applicant requested reconsideration of his request for his retired rank to be changed to lieutenant colonel. The applicant contends he was never made a subject of any substantiated adverse findings or conclusions from an officially documented investigation. This

is a mandatory DAFI requirement when initiating an OGD. The entire Security Forces Squadron (SFS) Summary Report should be thrown out because it is not an officially documented investigation that substantiated anything. Air National Guard (ANG) leadership used this worthless but legal document to write an administrative LOR that required no standard of proof. However, this SFS Summary Report was not acceptable material to justify an OGD. The standards of proof are much different. The previous AFBCMR cases did not observe critically important evidence nor take into consideration the mandatory requirements contained in the DAFI and AFIs. With the inclusion of the congressional inquiry, it now clarifies his OGD recommendation was improperly handled by the ANG.

The applicant makes multiple references to DAFI 36-3203, *Service Retirements*, in support of his contentions. He summarized the response from the XXX WG/CC<sup>1</sup> to the congressional inquiry clearly states the SFS Summary Report never made him a subject of any substantiated findings or conclusions from an officially documented investigation. This also confirmed the LOR contained false and misleading statements as it specifically referenced an unsubstantiated SFS Summary Report claiming the applicant fraternized. Submitting unsubstantiated claims in the OGD recommendation to the Secretary of the Air Force Personnel Council (SAFPC) is not in accordance with DAFI 36-3203. Furthermore, nowhere in his personnel record, LOR, OPRs, or OGD is there a single instance of adverse claims mentioned while he served as a lieutenant colonel. Every claim in the OGD recommendation occurred while he served as a major. In the interest of justice, equity, and fairness, the applicant requests the AFBCMR consider only substantiated adverse findings or conclusions from an officially documented investigation to determine the highest grade in which he served satisfactorily.

Per the applicant, all three women specifically mentioned in the SFS Summary Report and referred to in the LOR wrote witness statements in the applicant's defense. The AFBCMR applicant's summary in the previous case failed to acknowledge this crucial evidence which contradicts the unjust accusations made by the ANG leadership. DAFI 36-3203 was not followed as his chain of command included his immediate supervisor and rater from 24 Jun 19 to 30 Apr 22. ANG leadership excluded his supervisor from routing his OGD recommendation which is a DAFI requirement. Moreover, his witness statement supporting that the applicant should retire as a lieutenant colonel was unjustly omitted in his previous AFBCMR applicant summary. Additionally, every claim written in the OGD recommendation occurred prior to the applicant's promotion to lieutenant colonel. The applicant's date of rank was 30 Jan 19. The LOR inclusive dates are 1 Nov 12 to 20 Jul 18. Again, no comments in the SFS Summary Report, LOR, OPRs, or OGD recommendation mention any adverse comments while he served as a lieutenant colonel. This is not in compliance with DAFI 36-3203.

Finally, the applicant summarized that requiring a congressional inquiry to explain he was never the subject of any substantiated adverse findings or conclusions from an officially documented investigation was excessive.

In support of his reconsideration request, the applicant submitted the following new evidence: XXX WG/CC Congressional Response Letter, 22 Jan 24.

The applicant's complete submission is at Exhibit J.

## **APPLICABLE AUTHORITY**

Title 10, United States Code § 1370 (10 USC § 1370) – *Regular commissioned officers*,

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

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<sup>1</sup> Congressional response letter was from XXX WG/CC.

(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.

(2) *Determination of satisfactory service.* The determination of satisfactory service of an officer in a grade under paragraph (1) shall be made as follows:

(A) By the Secretary of the military department concerned, if the officer is serving in a grade at or below the grade of major general or rear admiral.

(B) By the Secretary of Defense, if the officer is serving or has served in a grade above the grade of major general or rear admiral.

(3) *Effect of misconduct in lower grade in determination.* If the Secretary of a military department or the Secretary of Defense, as applicable, determines that an officer committed misconduct in a lower grade than the retirement grade otherwise provided for the officer by this section:

(A) such Secretary may deem the officer to have not served satisfactorily in any grade equal to or higher than such lower grade for purposes of determining the retirement grade of the officer under this section; and

(B) the grade next lower to such lower grade shall be the retired grade of the officer under this section.

(d) *Conditional Retirement Grade and Retirement for Officers Pending Investigation or Adverse Action.*

(1) *In general.* When an officer serving in a grade at or below the grade of major general in the Army, Air Force, Marine Corps, or Space Force or rear admiral in the Navy is under investigation for alleged misconduct or pending the disposition of an adverse personnel action at the time of retirement, the Secretary of the military department concerned may:

(A) conditionally determine the highest permanent grade of satisfactory service on active duty of the officer pending completion of the investigation or resolution of the personnel action, as applicable; and

(B) retire the officer in that conditional grade, subject to subsection (e).

(e) *Final Retirement Grade Following Resolution of Pending Investigation or Adverse Action.*

(1) *No change from conditional retirement grade.* If the resolution of an investigation or personnel action with respect to an officer who has been retired in a conditional retirement grade pursuant to subsection (d) results in a determination that the conditional retirement grade in which the officer was retired will not be changed, the conditional retirement grade of the officer shall, subject to paragraph (3), be the final retired grade of the officer.

10 USC 1370a – *Officers entitled to retired pay for non-regular service,*

(e) *Conditional Retirement Grade and Retirement for Officers Under Investigation for Misconduct or Pending Adverse Personnel Action.*

The retirement grade, and retirement, of a person covered by this section who is under investigation for alleged misconduct or pending the disposition of an adverse personnel action at the time of retirement is as provided for by section 1370(d) of this title. In the application of such section 1370(d) for purposes of this subsection, any reference to "active duty" shall be deemed not to apply, and any reference to a provision of section 1370 of this title shall be deemed to be a reference to the analogous provision of this section.

(f) *Final Retirement Grade Following Resolution of Pending Investigation or Adverse Action.*

The final retirement grade under this section of a person described in subsection (e) following resolution of the investigation or personnel action concerned is the final retirement grade provided for by section 1370(e) of this title. In the application of such section 1370(e) for purposes of this subsection, any reference to a provision of section 1370 of this title shall be deemed to be a reference to the analogous provision of this section. In the application of paragraph (3) of such section 1370(e) for purposes of this subsection, the reference to "chapter 71 of this title" shall be deemed to be a reference to "chapter 1223 of this title."

## **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 remains unconvinced the evidence presented demonstrates an error or injustice. The applicant's request for reconsideration repeats arguments previously adjudicated by this Board and were found insufficient to support his request. Regarding the applicant's new evidence, the XXX WG/CC congressional response clearly states neither criminal investigators nor reports of criminal investigation substantiate allegations or make conclusions, rather attorneys review and analyze evidence and commanders decide final action. In the instant case, the applicant was the subject of the criminal investigation. The standard of proof utilized to support the applicant's LOR, and his commander's authority to issue the LOR, were both in compliance with AFI 36-2907, *Adverse Administrative Actions*.

Further, the resulting OGD was conducted in accordance with DAFI 36-3203, 10 USC § 1370 and 10 USC § 1370a. It is wholly within Secretary of the Air Force authority to determine satisfactory service in any grade equal to or higher than the grade in which misconduct occurred. According to the SAFPC advisory opinion provided in response to the applicant's original petition, the Air Force Personnel Board (AFPB), the Secretary's delegate in this matter, determined the applicant did not serve satisfactorily in the rank of lieutenant colonel within the meaning of 10 USC § 1370a. The AFPB did find the applicant's service in the rank of major was satisfactory, despite the presence of misconduct in that rank. 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 DAFI 36-2603, paragraph 2.1, considered Docket Number BC-2022-02637 in Executive Session on 27 Mar 25:

, Panel Chair  
, Panel Member  
, Panel Member

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

Exhibit H: Record of Proceedings, w/ Exhibits A-G, dated 17 Aug 23.  
Exhibit I: Letter, SAF/MRBC (No New Evidence), Undated.  
Exhibit J: Application, DD Form 149, w/atch, dated 6 May 24.  
Exhibit K: Documentary evidence, including relevant excerpts from official records.

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.

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Board Operations Manager, AFBCMR