

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-00150

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

He requests the following based on an allegation of reprisal pursuant to DODD 7050.06, *Military Whistleblower Protection*, and 10 U.S.C. § 1034.

1. The finding in his three Article 138, Uniform Code of Military Justice (UCMJ) complaints that his commander did not act arbitrarily or capriciously or abuse his authority be reversed and his commander be culpable of misconduct.
2. His Record of Individual Counseling (RIC) dated 12 Jan 12 be void and removed from his records.
3. His duty history in the military personnel data system (MilPDS) be corrected to show he was not removed from his position.
4. His enlisted performance report (EPR) for the reporting period ending 30 Sep 22 be updated to show he was performing in dual positions and he be considered for stratification.
5. The letter of reprimand (LOR) issued to [redacted] dated 12 Jan 21 be void or corrected to remove the reference to his request for a liberty pass and leave.
6. He be supplied with copies of any documentation his former unit commander possesses which includes derogatory information about him.

APPLICANT'S CONTENTIONS

His commander derailed his career. Due to his commander's misconduct, he was not considered for stratification and will most likely not be promoted within the next five years. He went from leading the largest section in his career field leading 75 personnel to leading a commander support staff (CSS) of 13 personnel. He and three others were arbitrarily and capriciously removed from the unit. His commander issued him an RIC after he was reassigned and he was no longer his commander. His commander also issued the flight chief an LOR referencing him and spreading misinformation about them. AFI 36-2907, *Adverse Administrative Actions*, states general officers, commanders, first sergeants, supervisors and other individual's administrative chain of command can issue administrative actions. His commander's administrative and operation control of him ended on 21 Oct 21, via the removal of duty memorandum; however, he issued him an RIC on 12 Jan 22 for failure to properly take leave in accordance with AFI 36-3003, *Military Leave Program*.

His commander did not have a leave or pass policy in place. In Sep 21, he asserted an inaccurate interpretation of AFI 36-3003 regarding the local area for leave definition. The lack of a standard led to unfair and unjust application of the local area leave definition. On 10 Sep 21, he updated

his leave in Leave Web to align with his vision; however, he persisted in gathering information from senior noncommissioned officers (SNCO) to further validate firing the flight chief. The flight chief received an LOR which stated an investigation revealed he approved his request for a liberty pass from 4 to 8 Sep and regular leave from 6 to 17 Sep 21, which violated AFI 36-3003. He targeted the flight chief over an extended period of time.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a master sergeant (E-7) in the Air Force.

In a memorandum dated 21 Oct 21, the applicant was notified by his commander he was removed from the squadron due to a loss of trust and confidence in his ability to serve as a SNCO per AFI 36-2618, *The Enlisted Force Structure*. During a collective feedback session, the applicant disagreed with his commander's decision to discipline him. After an explanation, he promulgated a toxic work environment within the flight. He was transferred to another squadron.

After his reassignment to another unit, the applicant was issued an RIC on 12 Jan 22 by his former commander. The RIC was endorsed by his new commander. The RIC was to serve as a record of two conversations where he failed to properly take leave in accordance with AFI 36-3003. It stated the applicant admitted to being out of the local area when his local leave started. They also discussed how the command team lost respect for the entire flight. In a response dated 12 Jan 22, the applicant stated the RIC was in reprisal for an inspector general (IG) complaint he filed.

On 19 Jan 22, the applicant filed an informal complaint under Article 138. The applicant alleged he was harmed as a result of his commander's inaccurate interpretation of AFI 36-3003. He was accused of promulgating a toxic work environment and he and three others were removed from their positions. In a response dated 17 Feb 22, his commander granted his request for removal of the memorandum relieving him of his duty which was placed in his personal information file (PIF). His request for update of his duty history to show he held dual positions was denied and the request the commander use the events as a learning opportunity was dismissed.

On 25 Feb 22, the applicant submitted a corrected informal complaint under Article 138. He stated the relief did not fully correct the wrongs that were committed. He met the burden of proof to show that the removal actions taken were wrongful and in violation of multiple laws and or regulations and were an abuse of his commander's authority to reassign SNCOs. His commander scheduled a meeting on 15 Oct 21 with all SNCOs. While his commander solicited feedback under the pretense for improvement, he used the information to selectively remove four SNCOs from their positions and transfer them to different squadrons. His commander casted aside an entire flight he was charged with leading. He targeted the flight chief over an extended period of time. He requested his records be updated to show he held dual positions and information be included in his EPR to show he was reassigned due to mission related reasons. In a response dated 24 Mar 22, the applicant was informed the requested relief was not eligible for Article 138 review, pursuant to AFI 51-505, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice*.

On 4 Mar 22, the applicant filed an informal complaint under Article 138 alleging violations by his commander in the decision to remove him and four others from the unit. He requested his duty history be updated to reflect he held dual positions and he was reassigned due to mission reasons. In a response dated 4 Apr 22, the group commander (GP/CC) informed the applicant his request was denied and he could submit a formal complaint to the numbered air force commander (NAF/CC) within 30 days of receiving the notification.

On 22 Mar 22, the applicant filed an informal complaint under Article 138. The applicant contended the RIC should not have been issued and the commander's actions violated AFI 36-2907, *Adverse Administrative Actions*. His commander in a response dated 20 Apr 22, denied the applicant's request that all copies of the RIC be destroyed. The RIC was the least severe form of written administrative action. On 12 Jan 22, the applicant's commander concurred the RIC would be issued by the applicant's former commander and it would be finalized by the current commander. Therefore, all copies of the RIC would remain within the unit.

SAF/IG provides the applicant's IG complaint case file. On 26 May 22, the applicant filed an AF Form 102, *Inspector General Complaint*. He stated the complaint was based on his previous complaints FRNO 2021-17108 and 2021-18622. He provided new evidence to include memorandums for record (MFR), witness statements and Defense Organizational Climate Survey (DEOCS) information. On 21 Oct 21, his commander falsified a removal memorandum which was destroyed via Article 138 relief. He received a RIC which was destroyed by his new commander. His commander used the leave issue as a reason in his quest to remove the flight chief. The past two DEOCS surveys did not substantiate his commander's claims. He also stated his commander used profanity towards a SNCO. The IG case file includes seven MFRs signed by his commander, all dated 17 Oct 21. His commander stated the evidence showed the applicant combined a four day pass with regular leave and he needed to hold the applicant responsible. He asked the flight chief to issue the applicant a flight level letter of admonishment (LOA); however, the flight chief refused because he did not agree with the action. He then asked the other chief master sergeant to issue the LOA and he accepted. Ultimately, the senior master sergeant (E-8) would offer to administer the paperwork but then he also recanted the offer to issue an LOA. His commander stated in an MFR that there was a meeting with the flight's SNCOs regarding general displeasure of his handling of disciplinary cases. During the meeting, the applicant summarized with a comment that the command team was not fit to lead the flight. The commander had hoped the meeting would be more constructive; however, every SNCO came to the applicant's defense regarding the leave and pass violation. As soon as the meeting was over, the commander knew his intent was again challenged and the culture and climate had degraded to an us versus them situation and something would need to be done. On 10 Jun 22, the major command inspector general (MAJCOM/IGQ) dismissed and closed the applicant's complaint and found further investigation was not warranted in accordance with AFI 90-301, *Inspector General Complaints Resolution*, Table 3.3., Rules 6 and 7. The wing commander (WG/CC) was aware of his complaint and dismissed his allegations. Moreover, he filed for redress under Article 138 with similar allegations and the NAF/CC dismissed his complaint. The complaint was command related and the proper chain of command conducted an independent review and addressed his complaint. The applicant was advised he could petition the AFBCMR for correction of his records.

On 28 Mar 22, the applicant filed a formal complaint under Article 138. He alleged his commander illegally and arbitrarily removed the flight chief from his position. His commander incorrectly interpreted AFI 36-3003, did not have a leave policy in place until 1 Oct 21, 14 days after his leave was finished. The lack of an established standard led to an unfair and unjust application of the local leave definition. On 21 Oct 21, his command illegally, arbitrarily and capriciously removed him, the flight chief and two other SNCOs from the unit. He requested a commander directed investigation (CDI) be initiated, his duty history be updated to show he held dual positions and his EPR document he was reassigned for mission related reasons. The NAF/CC in a response dated 9 May 22 informed the applicant AFI 36-3003 defined the local area in the absence of command leave policy. The NAF/CC stated the applicant was removed from the unit based on his commander's determination he promulgated a toxic work environment. The NAF/CC did not find the applicant met his burden to prove his commander wrongfully acquired the information from subordinates. His decision was within the scope of his command authority to take personnel actions to maintain good order and discipline. The applicant's request for a CDI and update of his duty history was denied and the complaint was dismissed.

On 14 Apr 22 and 25 Apr 22, the applicant filed a formal Article 138 complaint. He requested a CDI and his duty history be updated to show he held dual positions and was reassigned for mission reasons. On 9 May 22, the NAF/CC dismissed the applicant's complaint. The response constituted the final action on his Article 138 complaint and the matter forwarded to AF/JAJI for final review of the applicant's complaint.

The applicant provides comments from the unit's DEOCS survey, with survey dates 18 Apr 22 to 5 May 22.

The applicant's EPR for the reporting period 1 Oct 21 to 30 Sep 22 reflects his overall rating as "Exceed most, if not all expectations," shows his duty title as "CSS Section Chief" and does not include any stratification statements.

The MilPDS shows his duty title effective 21 Oct 21 as "CSS Section Chief." His duty title effective 30 Aug 21 is "JEIM Section Chief."

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

APPLICABLE AUTHORITY/GUIDANCE

Per 10 U.S.C. § 1034 and AFI 90-301, *Inspector General Complaints Resolution*, reprisal against military members for making protected disclosures is prohibited.

The MAJCOM/IGQ cites AFI 90-301, Table 3.3, How to Conduct a Complaint Clarification, For Cases that involve 10 U.S.C. § 1034 issues Rules 6 and 7 for dismissing the applicant's complaint. Rule 6 states the IG should focus the complaint clarification interview on the protected communications, personnel actions and information that suggests the possibility of a causal connection between the protected communications and the personnel actions. Rule 7 states to obtain as much detail as possible and that dates are particularly important regarding the protected communications and personnel actions and whether an inference of reprisal is evident.

AFI 90-301, paragraph 3.8. Complaint Clarification Procedures. All IGs receiving complaints that allege wrongdoing or misconduct to be addressed in IG channels will complete a complaint clarification interview after the initial complaint intake. This interview must be documented in the case file before the Inspector General of the Department of Defense Whistleblower Reprisal Investigations (DOD IG) will approve the recommendation. The applicant's IG case does not include a review of his case by the SAF/IG or the DOD IG. However, the applicant's Formal Article 138 complaint was reviewed by the NAF/CC and dismissed. On 10 Apr 23, the Office of the Judge Advocate General Military Justice and Discipline determined the actions of the NAF/CC complied with the applicable laws and regulations. The response constituted the final actions on his Article 138 complaints.

DAFI 36-3003, *Military Leave Program*, paragraph 4.3, Special Pass. Unit commanders may award three or four day special passes for special occasions or circumstances. They may delegate approval to a level no lower than squadron section commander, deputies or equivalents. Special passes start after normal working hours on a given day. Paragraph 4.3, A special pass may be taken in conjunction with leave without a duty day between special pass and leave period. The member must be physically present in the local area when departing and returning from leave. The local area is the place where the member lives and from which he commutes daily to the duty station. Leave may be taken either prior to or following the special pass but not both before and after the special pass.

DAFI 36-2406, *Officer and Enlisted Evaluations Systems*, The evaluation report appeals board (ERAB) will not consider nor approve requests to 10.2.4.1. Void an evaluation when the error or injustice can be corrected administratively. 10.2.4.2. Void an evaluation while keeping attachments to that evaluation. 10.2.4.3. Void an evaluator's section while keeping comments or ratings of subsequent evaluators. 10.2.4.4. Void an evaluator's comments but keep the ratings (or vice versa). 10.2.4.5. Delete required information or add unauthorized information to an evaluation. 10.2.4.6. Change (except for deletions) an evaluator's ratings or comments if the evaluator does not support the change. When an evaluator supports changing ratings, all subsequent evaluators must also agree to the changes (including the commander on EPRs, the reviewer on OPRs, and the Management Level Review Board President on PRFs). (T-1). Justification is required from the original evaluators. See Attachment 2, paragraph A2.3. 10.2.4.7. Re-accomplish an evaluation without the applicant furnishing the new evaluation.

DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.4. The Board normally decides cases on the written evidence contained in the record. It is not an investigative body; therefore, the applicant bears the burden of providing evidence of an error or injustice.

AIR FORCE EVALUATION

AF/JAJI recommends denial. With respect to the request for removal of the LOR issued to the propulsion flight chief, the applicant's request for removal of the LOR is beyond the scope of relief the Board can provide per DAFI 36-2603, paragraph 3.1.6, which states apart from heirs or legal representatives, no applicant is eligible to obtain a correction of another person's record. With respect to the request for the correction of his EPR, DAFI 36-2603, paragraph 3.3., requires applicants to exhaust all other available administrative remedies before applying for relief from the AFBCMR. This includes the ERAB for performance report errors and corrections.

The relief requested regarding the Article 138 complaints is not ripe because the complaints are still processing. According to NAF/CC, the RIC has already been removed; therefore, the request for relief is moot.

With respect to the request for updates to his duty history, specifically that his CSS section chief duty title effective date be changed to 1 Mar 22 does not represent an error in his military records but emphasizes his disagreement with the removal action taken against him.

DAFI 36-2603, paragraph 3.4.4, provides the applicant has the burden of providing evidence in support of their allegations. Here, the applicant has offered no such evidence outside of the claims contained with his brief. There is no evidence to indicate his commander's decisions were arbitrary or capricious. All command actions were within the commander's discretion. The facts do not support a finding of an abuse of discretion. AF/JAJI finds no error and defers to the commander/fact finder. However, deference to the fact finder is not blind deference. Nevertheless, in this case, the applicant's claims are no more than a disagreement with the commander's decisions and finds the commander was in the best position to evaluate the information available to him to support the applicant's removal from the flight. There is no standard a commander has to meet to remove someone from a special position with the command.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 13 Jun 23 for comment (Exhibit E), and the applicant replied on 2 Jul 23. In his response, the applicant contended he did not utilize the ERAB because the corrections are not able to be rectified until there is an assertion of a

wrongdoing by his commander, which the ERAB does not have the authority to grant. It is also untrue that the Article 138 complaints are processing. Per the provided memorandum, on 10 Apr 23, before the 11 Jun 23 advisory opinion, AF/JAG denied his complaint and stated it constituted final action on his Article 138 complaint.

The requested changes to his EPR are to reflect actual performance of the rating period and to properly document the positions he held. With respect to the RIC, just because his new commander destroyed the RIC, this did not absolve the fact it was issued unlawfully. The RIC and the verbal counseling were supporting documents used to remove him from the unit, which is part of the correction he is requesting.

He provides a memorandum from the Deputy Director, Military Justice and Discipline dated 10 Apr 23 stating they determined the command actions taken by the NAF/CC were in compliance with applicable laws and regulations and the memorandum constituted the final action on his Article 138 complaints.

The applicant's complete response is at Exhibit F.

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 AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board acknowledges AF/JAJI recommends denial for the Board's adjudication of the request for changes to his EPR ending 30 Sep 22 and the request for review of his Article 138 complaints on the basis the applicant failed to exhaust available administrative remedies. However, the Board finds the applicant's requests for correction of his EPR and review of his Article 138 complaints are ripe for adjudication by the Board. The applicant's requested changes to his EPR are beyond the scope of the ERAB per DAFI 36-2406 and on 10 Apr 23, the Office of the Judge Advocate General Military denied the applicant's request for redress under Article 138, UCMJ. The applicant also requests his RIC dated 12 Jan 21 be removed from his records; however, there is no RIC in his records. Accordingly, the Board finds there is no action for the Board for the removal of the RIC. The applicant contends he was the victim of reprisal per 10 U.S.C. § 1034 and alleged in his Article 138 complaints his commander committed wrongdoings, misconduct and abused his authority. The Board, per DAFI 36-2603, is not an investigative body. However, the Board conducted an independent review of the applicant's complete case, to include his Article 138 complaints and IG complaint of reprisal. Based on the evidence, the Board finds the applicant's Article 138 complaints were thoroughly reviewed and considered and the Board finds no evidence of an error or an injustice in the denial of relief by the NAF/CC. Moreover, a final review of the Article 138 complaints was completed by the Office of the Judge Advocate General as required. The Board also finds there is no evidence to show the applicant was the victim of reprisal or abuse of authority per 10 U.S.C. § 1034. With respect to the request for correction of his EPR, the Board finds his duty title is correct as reflected. While the applicant desires changes be made to the EPR based on his disagreements, he has not provided evidence to show the EPR is not accurate or that it was not completed in accordance with DAFI 36-2406. The Board also finds no evidence of an error or injustice in his duty history as reflected in the MilPDS. Based on the presumption of regularity, the Board finds the applicant has not sustained his burden of proof to warrant granting the requested relief. Military administrators and commanders are presumed to act lawfully and in good faith and entitled to substantial deference in the governance of its affairs. 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-2023-00150 in Executive Session on 20 Jul 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 29 Dec 22.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: SAF/IG Complaint Case File, dated 26 May 22. (WITHDRAWN)
Exhibit D: Advisory Opinion, AF/JAJI, dated 11 Jun 23.
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 13 Jun 23.
Exhibit F: Applicant's Response, w/atchs, dated 2 Jul 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.