

Work-Product

CUI//SP-MIL/SP-PRVCY

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

Work-Product

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-00157

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His referral Officer Performance Report (OPR) for the period of 8 Jan 19 – 7 Jan 20 be expunged from his record and replaced with the submitted non-referral OPR.

APPLICANT'S CONTENTIONS

He was involved in a domestic incident with his former fiancée, arrested and was found guilty of misdemeanor domestic violence. Following the advice of his attorney, he did not disclose the conviction to his command after the trial. After his conviction appeal was denied, his attorney filed to have his case transferred to Veterans Court, where upon acceptance, his conviction was withdrawn, and his case was later dismissed upon his completion of a diversionary program. However, his conviction resulted in both a referral OPR and a Letter of Reprimand (LOR). The LOR was filed in an Unfavorable Information File (UIF) and subsequently removed from his records with the concurrence of both his Squadron and Wing Commander.

He submitted a request to the Evaluation Reports Appeal Board (ERAB); however, in accordance with Department of the Air Force Instruction (DAFI) 36-2406, paragraph 10.3.3 any changes that substantially alter the content must have a signature from all evaluators. As such, he reached out through his current supervisor to the Referral OPR rating official to see if they would be amenable signing a replacement OPR that removed reference to the adverse information (conviction). However, the rating official stated they would not sign off on the replacement OPR because in their opinion "The behavior should still be captured in the OPR."

The Air Force has committed a material error by maintaining his referral OPR in his record. According to Air Force Instruction (AFI) 36-2406, paragraph 1.12.4.2.5, the Air Force should "not reference any punitive or administrative actions taken against an individual in response to the conduct for which the member was acquitted or where the action was not actually taken." As the charge was dismissed and he currently does not have a criminal conviction on his record, the referral OPR should be expunged.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is an Air Force Reserve captain (O-3).

On 1 Nov 2018, according to documentation provided by the applicant, he was arrested and charged with Battery/Domestic Violence and was found guilty on 26 Jul 18.

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Controlled by: SAF/MRB
CUI Categories: SP-MIL/SP-PRVCY
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

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On 19 Dec 19, according to the letter, *To Whom It May Concern*, from Judge <name redacted>, **Work-Product** Municipal Court, Department 6, dated 5 Feb 20, document provided by the applicant, the judge states that the conviction was withdrawn, and the applicant is currently in the **Work-Product** **Work-Product** Municipal Court Veterans Treatment Program and that at the conclusion of the program, if all requirements are complete, <applicant's> charge for Battery/Domestic Violence will be dismissed.

On 11 Apr 20, AF Form 707, *Officer Performance Report*, for the reporting period of 8 Jan 19 – 7 Jan 20, was signed by his rating official and reflects: Section III, Performance Factors, “Does Not Meet Standards”; Section IV, *Rater Overall Assessment*, the following statement: “<applicant> was convicted of domestic violence in the previous rating period, but failed to notify his chain of command and thus received an LOR/UIF in this rating period.”; and Section IX, *Performance Factors, 3. Professional Qualities*, “Does Not Meet Standards.”

On 25 Aug 21, according to documentation provided by the applicant, the charge was dismissed.

On 20 May 22, according to myPers traffic provided by the applicant, he was notified that his ERAB request was received.

On 24 May 22, according to myPers traffic provided by the applicant, he was notified that the corrected copy (OPR) was incomplete as it was not signed by all the evaluators who signed the original.

On 6 Jun 22, according to email traffic provided by the applicant, his current supervisor “reached out” to the referral OPR rater who replied on 8 Jun 22 that they “don’t mind changing ‘convicted’ to ‘committed’ on the OPR but I still believe this should be a referral OPR. The behavior should still be captured in the OPR.”

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 Instruction (DAFI) 26-2406, *Officer and Enlisted Evaluation Systems*, 14 Nov 19:

Chapter 1, General Considerations, paragraph 1.12.3.4. Prior Events. Events that occurred in a previous reporting period that add significantly to the evaluation, were not known to and considered by the previous evaluators, and were not already reflected in a previous evaluation in the permanent record (this includes EPRs, OPRs, LOEs, and TRs) can be included in a subsequent evaluation. However, if the behavior has continued into the next rating period, an evaluator may comment on the specific behavior for that rating period.

Chapter 10, *Correcting Officer and Enlisted Evaluations*, paragraph 10.2.4., Prohibited Requests. The Board will not consider nor approve requests to: 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.

Attachment 2, *Appeal Guidance for Applicants*, A2.5.23 Re-accomplishing an evaluation: Along with supporting documentation, furnish a substitute evaluation in the appeal case. The substitute

evaluation must: Be signed by all the evaluators who signed the original evaluation (this includes the commander on EPRs). If an evaluator cannot be located, submit evidence of all attempts to locate the missing evaluator (i.e., certified mail receipt, emails, postal service). After all attempts have been exhausted, contact AFPC/DP2SPE for guidance.

AIR FORCE EVALUATION

AFRC/A1KK recommends denying the applicant's request. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice. After he was convicted on 26 Jul 18 of misdemeanor domestic violence, he failed to notify his chain of command of his conviction. Additionally, although the conviction was eventually withdrawn and then completely dismissed on 25 Aug 21 when he completed the diversionary program, the conviction was still in place during the OPR reporting period of 8 Jan 19 – 7 Jan 20.

In accordance with (IAW) Air Force Instruction, 36-2909, *Air Force Professional Relationships and Conduct*, paragraph 6.1.3, Reserve Component Airmen not on active duty but in an active status will submit reports under this policy at the first drill period after the date the conviction is announced, or within 30 days of the date the conviction is announced, whichever is early, even if the sentence has not been imposed or the Airman intends to appeal the conviction.

Additionally, IAW DAFI 36-2406 paragraph 10.2.4., Prohibited Requests. The Board will not consider nor approve requests to: 10.2.4.10, Void or correct an evaluation because an action (i.e. Unfavorable Information File, Control Roster, Article 15, etc.), was removed: 10.2.4.10.2.3, For the Evaluation Report Appeals Board to decide favorably to void the evaluation, the applicant must prove by a preponderance of the evidence that the behavior did not take place and the corrected action taken was officially set aside and not just removed or expired.

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 27 Jun 23 for comment (Exhibit D), but has received no response.

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/A1KK and finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant contends that in accordance with AFI 36-2406, his referral OPR must be expunged since the charge was eventually dismissed and thus, he does not have a criminal conviction. While the Board took note of the applicant's contention, the Board finds that it did not relieve him of his duty and responsibility to comply with AFI 36-2909 to report the initial conviction. Additionally, the Board determines that the inclusion of the incident does not violate either the spirit or intent of AFI 36-2406 as negative incidents from previous reporting periods involving the character, conduct, or integrity of the ratee that continued into a subsequent rating period may be commented upon and his failure to report his initial conviction that occurred during the previous reporting period meets these criteria. Additionally, the Board finds that the referral Officer Evaluation Report was well

within the rater's authority and discretion and the applicant failed to prove by the preponderance of the evidence that the behavior did not take place and the corrected action was officially set aside and not just removed. 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-2023-00157 in Executive Session on 15 Aug 23:

Work-Product [Redacted] Panel Chair
Work-Product [Redacted] Panel Member
Work-Product [Redacted] Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 28 Dec 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFRC/A1KK, dated 21 Jun 23.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 27 Jun 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.

3/25/2024

X *Work-Product* [Redacted]

Board Operations Manager, AFBCMR
Signed by: *Work-Product* [Redacted]