

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2023-00185

XXXXXXXXXX

**COUNSEL:** XXXXXXXX

**HEARING REQUESTED:** YES

### APPLICANT'S REQUEST

1. Expunge the substantiated allegation found during the Commander Directed Investigation (CDI) initiated on 17 Jun 20.
2. Remove his Letter of Reprimand (LOR).
3. Remove his Referral Officer Performance Report (OPR).
4. Amend his retirement rank to colonel (O-6).
5. Provide further relief as the Board deems just and proper.

### APPLICANT'S CONTENTIONS

Counsel, on behalf of the applicant, contended at the beginning of 2020, less than a year from retirement, the applicant was diagnosed with potentially life-threatening lung cancer. In the following months, he underwent aggressive treatment, to include multiple surgeries and hospitalizations, battling both cancer and the risk of contracting COVID-19. At this same time, he was accused of falsifying a Fitness Assessment to reflect a completed assessment he never took. Despite no actual document produced as evidence, he was subject to a CDI. Despite multiple deficiencies, the CDI substantiated the allegation against the applicant, resulting in an LOR and referral OPR. These adverse actions forced an Officer Grade Determination (OGD) to prove the applicant satisfactorily served at the grade of colonel (O-6). The Air Force Personnel Board (AFPB) that conducted the OGD was not provided all pertinent information, including an OPR accounting for a third of his service as an O-6 and his commander's letter of recommendation. The AFPB recommended he be retired in the lower grade of lieutenant colonel (O-5) in contradiction to the evidence available.

Counsel goes on to provide, in detail, excerpts from the applicant's Air Force career from his service as a second lieutenant (O-1) through O-5. On 1 Nov 17, the applicant was promoted to O-6. In Jan 18, he began processing for retirement after declining a year-long deployed commander opportunity in Iraq for family reasons. In anticipation of his retirement, he was awarded the Legion of Merit. Two months later, he was informed a significant number of colonels had declined the deployment opportunity and left the Numbered Air Force (NAF) short on rated colonels. As a result, he was asked to return to duty and his retirement orders were rescinded, the Legion of Merit was republished as a Permanent Change of Station (PCS) decoration, and his NAF PCS orders were issued.

In 2019, the applicant began receiving anonymous threatening letters that referenced his service in Iraq and Afghanistan, with an alarming amount of accuracy regarding his deployment dates, locations, and units. On 21 Oct 19, concerned for the welfare of his family and dealing with a sudden decline in health, he submitted a request to retire on 1 Jul 20. His command endorsed his retirement and waived by four months his time-in-grade so he could retire as an O-6.

In Feb 20, the applicant discovered a mass on his left breast and sought medical attention, where he underwent various tests to investigate the issue. On 26 Feb 20, the NAF Commander, (NAF/CC) informed the applicant that he was overdue for a Fitness Assessment and directed him to complete one by the end of Mar 20 so his annual OPR could be completed. The applicant disclosed his medical issues which would make it difficult to complete a Fitness Assessment. The NAF/CC advised he would not sign off on any physical and mobility restriction profiles until the applicant submitted to the NAF Commander Support Staff (CSS) a copy of his last Fitness Assessment. The applicant responded his most recent Fitness Assessment was Jun 17, which he was told to send over so there was something in his file for the OPR. Following these instructions, the applicant took a copy of the Jun 17 Fitness Assessment to the NAF/CSS so that a physical and mobility waiver would be signed.

On 13 Mar 20, the applicant was informed he had potentially life-threatening lung cancer that had metastasized on his liver, ribs, and spine. He was immediately placed on both physical and mobility restriction profiles. Over the next 5 months, he would endure over 20 days of hospitalization and undergo 5 surgeries, with 2 separate medical complications – one of which was life-threatening. On 7 Apr 20, he received an email from the NAF Support Division Director stating with the Fitness Assessment waiver, they could now process his OPR, and it was with the applicant in virtual Personnel Flight (vPF). That same day, the applicant entered vPF and completed his portion of the OPR. At this point, he understood the issues with his OPR and overdue Fitness Assessment to be resolved. However, on 4 Jun 20, the applicant received another email from the NAF Support Division Director stating the Fitness Assessment report the applicant had provided was from the previous year and asking if he had a report from last Oct [2019], as he was still showing overdue. The commander had his OPR for signature and was asking for an update. The applicant was in surgery on 1 Jun 20 and did not have an opportunity to respond. On 9 Jun 20, while still hospitalized, the applicant received a call from the commander directing him to report to the NAF Vice Commander (NAF/CV), which he did upon discharge from the hospital. The NAF/CV informed him the NAF/CSS levied four major allegations against him, to include falsifying a Fitness Assessment to show a completion date of 17 Jan 20. The applicant explained the NAF/CC instructed him to submit his most recent Fitness Assessment since he did not complete a Fitness Assessment in Oct 19, and was now unable to complete a Fitness Assessment due to his cancer diagnosis and treatment. He asked to see the alleged falsified document and the NAF/CV presented him a document that the applicant noted was a complete fake. He informed the NAF/CV the signature on the document was not his. The NAF/CV informed the applicant the NAF/CC intended to submit him for an OGD if he did not confess to submitting the fake Jan 20 [Fitness Assessment] document. The applicant understandably refused to admit to an action he did not take.

On 17 Jun 20, the CDI was initiated to look into whether the applicant falsified the Fitness Assessment by changing the test completion date of a prior document. The Investigating Officer (IO) interviewed the applicant and seven other witnesses. The IO's findings provide that some time in Feb or Mar 20, either the applicant or the NAF Support Division Director brought the CSS a copy of a Fitness Assessment that was faded and/or illegible, with clear pen and ink manipulation, with the signatures of two Fitness Assessment Cell staff members who had departed a year prior. The interview notes indicate the applicant repeatedly denied providing an Oct 19 Fitness Assessment to any CSS or NAF staff member, but he had discussed his Fitness Assessment with the NAF/CV in Jun 20. He openly acknowledged he failed to get a fitness test in Oct 19, and knew this would mean a referral OPR. Despite the applicant's testimony, the lack of an alleged falsified document, and various uncertainties of fact, the IO concluded the allegation was substantiated and the applicant had provided the CSS with a falsified copy of an Oct 19 Fitness Assessment. In addition, the IO alleged the applicant make two false official statements, under oath, during his interview; specifically, that he testified he did not provide a fitness assessment score sheet of any type and he submitted a draft OPR that was a referral OPR.

The NAF/CC concurred with the IO's findings and issued the applicant an LOR based on the CDI that found he made false official statements. At the same time, the NAF/CC issued him a referral OPR and informed him an OGD would be initiated. The applicant's referral OPR response insisted he did not falsify a Fitness Assessment and the heavily redacted CDI prevented him for substantively responding to allegations against him. He also highlighted that no alleged falsified document was produced, limiting the reliability and credibility of the witnesses and alleged contents of the document.

The applicant submitted a memorandum to the OGD board explaining why he should be retired in the rank of colonel and the inadequacies of the CDI. The NAF/CC found the applicant's submission to be too legal and wanted the applicant to submit a personal letter to humanize his situation. On 18 Dec 20, the AFPB considered his matter. Despite all of the members of his chain of command recommending the applicant be retired in the grade of O-6, the AFPB recommended he be retired in the grade of O-5. In considering his quality and length of service, the AFPB noted two favorable OPRs as an O-6, one referral OPR, and his Legion of Merit. The AFPB did not consider the applicant's last OPR. Additionally, the NAF/CC OGD recommendation letter was not completed until after the AFPB met, and accordingly, was not considered by the AFPB. The AFPB relied heavily on two previous cases of similar conduct to come to their conclusion, one case of an O-6 that received a Letter of Admonishment after a CDI substantiated allegations of falsified fitness scorecards and abuse of authority for directing their input to the system of record. Despite his excellent record and time in grade, this O-6 was retired in the grade of O-5. The second past case dealt with an O-5 who received an Article 15 for failing to schedule a fitness test, making a false official statement, and falsifying their leave record. This officer was retired in grade on the basis of minimal unit impact, multiple awards, and time in grade.

Counsel further details how the CDI did not comply with Department of the Air Force Manual (DAFMAN) 1-101, *Commander Directed Investigations*, [published 9 Apr 21] and was improperly conducted and significantly prejudiced the applicant. Most importantly are the new or different issues that come to light during the investigation which the IO has a duty to address with the commander. The IO improperly conducted the investigation, making it procedurally and substantively deficient in many ways. The IO failed to provide the applicant with a copy of the prepared summary of his testimony for his review or obtain his signature to confirm its accuracy; therefore, there is no way to ascertain which portions are accurate and which are misstatements or misrepresentations of his live testimony. The fact that his summarized statements were used to substantiate two additional allegations of false statements underscores the importance of adhering to procedure. The IO then failed to address these two new issues with the commander prior to providing her findings and recommendations. Both the IO and NAF/CC failed to properly address the new allegations. If the NAF/CC intended to expand the scope of the CDI, he would have to amend the allegations listed in the appointment letter. Once this occurred, the IO would have to inform the applicant and re-interview him. The applicant was not informed of the new allegations until he was issued the LOR; thereby, denying him the opportunity to respond during the CDI.

Additionally, the facts gathered by the IO did not support a preponderance of evidence that the applicant altered the Fitness Assessment. Most egregiously, no actual document was ever provided as the alleged falsified Fitness Assessment. Instead, the IO used uncertain and confusing testimony of other witnesses to corroborate the story that the applicant provided an altered document when he had already acknowledged to multiple individuals, including the NAF/CC, that he had not completed an Oct 19 Fitness Assessment. The IO also did not take into consideration the applicant had recently undergone intensive surgery, was in severe pain, and using his prescribed heavy-dose pain medicine. Had the CDI been conducted properly and

fairly, the allegations would not have been substantiated. For these reasons, the LOR and referral OPR must be rescinded due to the CDI deficiencies.

Furthermore, an OGD should have never occurred. However, if the board believes misconduct occurred, the applicant's exemplary service as an O-6 significantly outweighs that misconduct. The AFPB should consider all five factors pursuant to Air Force Instruction (AFI) 36-3206 [sic]<sup>1</sup>. Given his pending retirement, the applicant stood to gain no benefit from submitting a falsified Fitness Assessment, as his retirement would not have been impacted by the completion/non-completion of an Oct 19 Fitness Assessment and his medical status made it so no further Fitness Assessments would be required. As recognized by the AFPB, the file does not document an impact on the effectiveness of the unit. The length of the alleged misconduct is limited. In fact, the entirety of the CDI lasted only two and a half months. The two favorable OPRs reviewed by the AFPB only accounted for two-thirds of the applicant's service as an O-6. The AFPB did not have the opportunity to review the OPR covering the period 26 Feb 20 through 21 Jan 21. The AFPB's reliance on the first past case of an O-6 that falsified documents on more than one occasion, constituting a pattern of misconduct was misplaced. The case cited by the AFPB of the O-5 who received an Article 15 more closely resembled the applicant's matter. Finally, the AFPB noted the applicant's chain of command all recommended he be retired in the higher grade of O-6; however, the AFPB did not have the NAF/CC letter of recommendation prior to considering the matter.

Finally, the AFPB concluded its decision admonishing the applicant for his utter lack of integrity and recommended retirement at the lower grade of O-5. Given the facts at hand, the AFPB characterization and discussion of this matter are excessively harsh without justification, is a clear error, and reflects a clear injustice. The applicant's record should be corrected to reflect the rank that his honorable service necessitates.

The applicant's complete submission is at Exhibit A.

## STATEMENT OF FACTS

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

On 5 Apr 19, according to *Air Force Fitness Management System II Member Individual Fitness Report*, the applicant achieved a satisfactory fitness level with a composite score of 86.6, with a new test due date of 31 Oct 19.

SAF/IG provides a Commander Directed Informal Inquiry, dated 17 Jun 20, concerning allegations of misconduct. The inquiry shows the NAF/CC appointed an IO to investigate the following allegations:

**Allegation 1:** The applicant on or about 1 Feb 20 and on or about 31 Mar 20, with intent to deceive, sign an official record, to wit: an official physical fitness test (PFT) completion report or similar type PFT completion document, which record was false in that the applicant did not take a PFT during the alleged time period and instead changed the test completion date on this document, and this document was then known by the applicant to be false. **(SUBSTANTIATED)**.

**Allegation 2:** On or about 4 Sep 19, the applicant, who knew of his duties was derelict in the performance of his duties in that, after randomly selected and ordered to provide a urine sample for drug testing purposes, willfully failed to provide a urine sample within the required time limits as it was his duty to do so. **(NOT SUBSTANTIATED)**.

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<sup>1</sup> AFI 36-3203, *Service Retirements*.

On 28 Jul 20, according to a 16-page memorandum for the NAF/CC, the NAF/JA (Deputy Staff Judge Advocate) found the Commander Directed Informal Inquiry legally sufficient and indicated the report addresses all of the matters under inquiry, the findings are supported by a preponderance of the evidence, and the conclusions reached are consistent with those findings. As the Appointing Authority the NAF/CC may: (1) direct the IO to conduct further investigations; (2) Concur with the IO's determinations; or (3) Non-concur with some portion or all of the IO's determinations. NAF/JA recommended the Appointing Authority approve the IO's findings and conclusions as written.

On 20 Aug 20, the NAF/CC concurred with the findings and conclusions of the Informal Inquiry.

On 28 Aug 20, as a result of the CDI finding of substantiation, the applicant was issued an LOR. He provided a response to the LOR on 7 Sep 20. The LOR issuing authority decided to maintain the LOR in an Unfavorable Information File (UIF) and have it placed in the applicant's Officer Selection Record.

On 28 Aug 20, according to AF Form 707, *Officer Performance Report (Lt thru Col)*, for the period 26 Feb 19 through 25 Feb 20, Section III. *Performance Factors*, was marked "Does Not Meet Standards" triggering a referral report, in accordance with AFI 36-2406, *Officer and Enlisted Evaluation Systems*. The applicant provided a response to the referral OPR on 7 Sep 20.

On 9 Feb 21, according to Secretary of the Air Force action, the applicant served satisfactorily in the grade of O-5 within the meaning of Section 1370a of Title 10, United States Code (10 U.S.C. § 1370a) and it was directed that he be retired in that grade.

On 17 Feb 21, the applicant was issued AF Form 707, for the period 26 Feb 20 through 21 Jan 21.

On 31 Mar 21, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, the applicant was released from active duty in the grade of O-6, for the purpose of retirement. His effective date of pay grade to O-6 is 1 Nov 17. He was credited with 24 years, 9 months, and 13 days active service.

On 1 Apr 21, according to Special Orders No. XXXXX, dated 11 Feb 21, the applicant was retired in the grade of O-5.

On 21 Apr 21, according to documentation provided by the applicant, the NAF/CC provided a memorandum of support, Subject: Officer Grade Determination.

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

## **APPLICABLE AUTHORITY/GUIDANCE**

In accordance with *Commander Directed Investigation (CDI) Guide*, current as of 1 Jun 18, paragraph 7.3. *CDI "Appeals."* There is no formal appeal process for a CDI. Any "appeal" is entirely within the discretion of the initiating commander and the next echelon of command. As a general proposition, the "appealing" party should provide additional information to justify a review. Simply disagreeing with the results does not ordinarily constitute sufficient justification for further review or additional investigation. Complainants and subjects may appeal a subsequent adverse administrative action or non-judicial punishment to the Air Force Board for Correction of Military Records pursuant to AFI 36-2603, *Air Force Board for Correction of Military Records*, for substantive relief. Active duty members may be able to use Article 138,

*Complaints of Wrongs*, to request redress from the Commander and General Court-Martial Convening Authority. An "appeal" alleging reprisal must be referred to the Inspector General.

AFI 36-2406, dated 14 Nov 19, paragraph 1.10. *Referral Evaluations*. Performance evaluations must be referred when an officer fails to meet standards in any one of the listed performance factors, in Section III or Section IX of the OPR, the overall evaluation will be a "Does Not Meet Standards" and must be referred. Note: If the evaluation is marked "Does Not Meet Standards," there must be a comment pertaining to the behavior in the referring evaluator's assessment block. Comments in the referral memorandum do not meet this requirement. An evaluator marks "Does Not Meet Standards" in Section III of AF Form 707 or "Do Not Retain" in Section IV of AF Form 912.

In accordance with AFI 36-2907, *Adverse Administrative Actions*, dated 20 May 20 (Incorporating Change 1, 15 Jan 21), paragraph 2.4.6. *Rescinding RIC [Record of Individual Counseling], LOC [Letters of Counseling], LOA [Letters of Admonishment] or LOR documents contained in a PIF or a UIF*. Individuals, if equal to or senior in grade to the initial imposing authority, may rescind RICs, LOCs, LOAs or LORs upon his or her own initiative or upon a request from the member if the member is within their command. For example, if an E-7 issues an LOR to a subordinate E-3, the E-3 petitions the squadron commander to rescind the LOR. These individuals may rescind RICs, LOCs, LOAs or LORs only in the following circumstances: in the rare situation in which new evidence shows, by a preponderance of the evidence, that the member did not commit the act underlying the original administrative action; if the issuing authority issued the administrative action in a way that violated the member's due process rights; or; if the appropriate authority determines more or less severe action is warranted. For officers, the member's current wing commander, or individuals in the current chain of command and equal or senior in grade to the initial imposing authority, may rescind RICs, LOCs, LOAs or LORs contained in the member's UIFs.

Air Force records contained in other Air Force records systems, not a unit PIF or UIF (for example, senior officer UIFs), may not be rescinded by a commander or civilian director. After the disposition date of the record (in either a PIF or UIF) has passed, members may apply to the Air Force Board for Correction of Military Records to have their records of RICs, LOCs, LOAs, or LORs removed from other Air Force records systems.

## **AIR FORCE EVALUATION**

SAF/MRBP (Secretary of the Air Force Personnel Council) recommends denying the applicant's request to correct his retirement grade to O-6. After a thorough review of the application, and the documentation submitted by the applicant, there is insufficient evidence to conclude he has been a victim of an error or injustice. AFI 36-3203, *Service Retirements*, paragraph 8.6. notes that a military officer is not automatically entitled to retire in the highest grade held. An officer is retired in the highest grade in which the officer served satisfactorily (with sufficient time in grade or a waiver) as determined by the Secretary of the Air Force or delegate. Paragraph 8.6.3.5. requires an OGD be initiated when an officer submits a retirement request and 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). Additionally, paragraph 8.6.2.2. outlines that when considering whether an officer has provided satisfactory or credible service, the Secretary of the Air Force 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.

In Jul 20, a CDI concluded the applicant knowingly signed and submitted a falsified official Air Force PFT completion report to prove he was current on his Air Force PFT requirement when he was not actually current. This misconduct was documented in an LOR issued to the applicant in Aug 20 which explained that the applicant did, at or near [Base], between on or about 1 Feb and 31 Mar 20, with intent to deceive, sign an official record, to wit: an official PFT completion report or similar type PFT completion document, which record was false in that, the applicant did not take a PFT during the alleged time period and instead changed the test completion date on this document, and this document was then known by the applicant to be false. Further, according to the LOR, in addition to knowingly signing and submitting a falsified official document, the applicant made false official statements to the IO after taking an oath and swearing to be truthful in violation of Article 107, Uniform Code of Military Justice (UCMJ). The applicant provided an LOR response; however, the LOR was upheld, placed in an UIF and his OSR, and resulted in the applicant receiving a referral OPR.

In Sep 20, a mandatory OGD was initiated by the NAF/CC in order to determine the highest grade held in which the applicant served satisfactorily, based on the substantiated finding or conclusions from the CDI and resulting LOR. The AFPB analyzed the applicant's military service as an O-6 using the five mandatory factors and recommended the applicant be retired in the lower grade of O-5. In Feb 21, after a thorough review of the evidence of record, which included the applicant's responses to the LOR, resultant referral OPR, and OGD, the Secretary of the Air Force delegee (SAF/MRB) determined the applicant's service in the grade of O-6 was not satisfactory and directed his retirement in the grade of O-5.

The applicant attributed the issue to his distraction from his Air Force obligations while struggling with personal tragedy. The AFPB considered the applicant's and his counsel's responses as part of its deliberative process but found it troubling the applicant never accepted responsibility for the false statements, and changed his narrative based on facts presented that contradicted his previous statements. Although his chain of command supported retirement in the higher grade, this one factor does not carry greater weight than the other four factors. Furthermore, the command does not have the AFPB's broader perspective in determining what is fair and equitable. Ultimately, the misconduct committed by the applicant was egregious enough to cause his service in the grade O-6 to be deemed not satisfactory in accordance with 10 U.S.C. § 1370.

While the applicant made arguments intended to impugn the CDI and findings which formed the basis for the LOR, they were sufficient to conclude he committed the documented misconduct. The CDI was based on interviews with several witnesses and evidence, which corroborated the version of events described in the CDI and supported its conclusions. The applicant presented no evidence that would serve to undermine the credibility of witnesses or the IO. The applicant further contended it was unfair for SAF/MRB to make a decision on the OGD while his final OPR was still not a matter of record; however, he presented no evidence that he had been treated differently than others similarly situated. In this case, the AFPB adjudicated the case in Dec 20 and SAF/MRB signed the decision on 9 Feb 21. The applicant acknowledged receipt of his final OPR on 22 Feb 21. The OGD must be adjudicated prior to a member's retirement; therefore, it is not uncommon for the OGD to be adjudicated before a final OPR is a matter of record. The subject of the OGD has an opportunity to provide evidence that speaks to their duty performance and accomplishments before the matter is referred to the Secretary of the Air Force delegee for a decision. Indeed, the applicant took full advantage of the opportunity to provide such evidence as his rebuttal included, among other things, a recommendation letter from the officer who issued the LOR and several character witnesses. Finally, the applicant presented no evidence that he was precluded from including information in his rebuttal describing his positive accomplishments during his last reporting period, which is also when he received the contested LOR, which documents substantiated misconduct during his last two reporting periods.

While the applicant made some noteworthy contributions during his service in the grade of O-6, the documented misconduct was serious and sufficient to render his relatively short service in the grade, on balance, not satisfactory.

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 16 Aug 23 for comment (Exhibit D), and the applicant replied on 15 Sep 23. In his response, applicant's counsel contended the Air Force failed to follow mandatory procedural requirements when routing the OGD package to the AFPB. The OGD was substantively based on a CDI that resulted in an LOR and referral OPR. The CDI was procedurally and substantively deficient. Evidence indicated the applicant's service in grade was satisfactory and creditable using the enumerated factors in AFI 36-3203.

The advisory opinion recognized the applicant made some noteworthy contributions during his service in the grade of O-6 yet argued the misconduct was sufficient to render his service in the grade not satisfactory. Pursuant to AFI 36-3203, paragraph 8.6.2., the following factors are relevant to the determination of whether an officer provided satisfactory or creditable service during the period in a particular grade: (1) the nature and length of the of the officer's improper conduct; (2) the impact conduct had on military effectiveness; (3) the quality and length of the officer's service in grade; (4) past cases involving similar conduct; and (5) recommendations by the officer's chain of command. The advisory opinion failed to examine the material error in this matter or to fully consider the statutorily mandated review based on the existence of an injustice under the facts presented. The advisory opinion submitted conclusory remarks and entirely dismissed that the AFPB was not provided the NAF/CC recommendation letter or the applicant's final OPR, as required by AFI 36-3203.

The advisory opinion casually dismissed these concerns, noting most officers facing an OGD do not get their final OPR included, and the applicant had the opportunity to submit recommendation letters or positive contributions during the process, which overrides any prejudice to the applicant. That is not the standard required by AFI 36-3203, as the inclusion of the enumerated documents was not a polite suggestion. The OPR and recommendation were required to be included in the routing package. The applicant served 24 years in the Air Force, sacrificed time with family for deployments, and gave everything he had physically, mentally, and spiritually. Adherence to the regulations is the very least the government could do to protect his due process rights during the aggressively invasive OGD process. The advisory opinion deflected this responsibility noting this is common as it relates to a final OPR. The fact that this is common is a significant concern for any officer facing an OGD. The attempt to minimize the procedural errors do not mitigate the damage experienced by the applicant whose due process rights were violated.

The applicant continues to maintain his innocence and denies allegations in the LOR and referral OPR. The CDI was poorly conducted and failed to meet several foundational expectations necessary to ensure a fully informed decision. The applicant was unable to meet with defense counsel prior to the interview with the IO. He experienced extreme discomfort, confusion, and anxiety when facing the accusations. The IO interviewed the applicant first and never gave him the opportunity to address contradictions or gaps in the testimony provided by the other witnesses. In fact, the IO never allowed him to review his own testimony or submit written matters as required at the conclusion of CDI interviews. The applicant was also not provided an opportunity to address additional allegations. This led to procedural and substantive gaps in the investigation that prejudiced the applicant.



Additionally, the evidence does not support the IO's position. The applicant had no motivation to falsify a Fitness Assessment. He had never failed a Fitness Assessment in his 24 years of service. He had already acknowledged the failure to perform the Fitness Assessment to multiple individuals, and his plan was to retire, minimizing the consequences. The factors identified in AFI 36-3203 strongly weigh in the applicant's favor. The alleged incident occurred while he battled a serious illness and implicated a minor percentage of his time in grade. There is also no evidence that this impacted military effectiveness. The applicant continued to serve in a leadership role until he retired. His service as an O-6 was satisfactory as evidenced by three favorable OPRs and a Legion of Merit. Further, there was a similar case where an O-5 was allowed to retire in grade. The circumstances of the applicant's case are less egregious, and he is a far more favorable candidate.

Finally, the applicant's chain of command unanimously recommended he retire in the grade of O-6, and were aware of the CDI, LOR, and referral OPR. They knew the applicant, his sacrifice to service, his story, and most importantly, they knew an injustice when they saw it. Consequently, they advocated for the just and equitable result to allow the applicant to retire as an O-6.

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. The CDI was found to be legally sufficient in accordance with the guidance in effect at that time, *Commander Directed Investigation (CDI) Guide*, current as of 1 Jun 18. Based upon the substantiated finding, the resulting LOR and referral OPR were both issued in accordance with their guiding directives, AFI 36-2907 and AFI 36-2406, respectively. The applicant was afforded due process and availed himself of the opportunity to provide written matters in his support. The OGD triggered by the substantiated finding was conducted in accordance with AFI 36-3203, considering the five factors to determine if his service in grade was satisfactory. The AFPB's lack of consideration of the applicant's final OPR and the NAF/CC letter of recommendation is appropriate as neither document existed at the time the applicant's OGD was adjudicated. Finally, there is no evidence that the applicant has been treated differently than other service members 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-2023-00185 in Executive Session on 16 Nov 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 20 Nov 22.  
Exhibit B: Documentary evidence, including relevant excerpts from official records.  
Exhibit C: Advisory Opinion, SAF/MRBP, dated 16 Aug 23.  
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 16 Aug 23.  
Exhibit E: Applicant's Response, w/atchs, dated 15 Sep 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.

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Board Operations Manager, AFBCMR