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

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-01364

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COUNSEL: Work-Prod...

HEARING REQUESTED: YES

### APPLICANT'S REQUEST

1. His substantiated complaints of reprisal and restriction noted in the Report of Investigation (ROI), undated, be reviewed, overturned, and changed to unsubstantiated findings.
2. His Letter of Counseling (LOC) and all associated adverse actions resulting from the ROI, be removed from his officer selection record (OSR).

### APPLICANT'S CONTENTIONS

His administrative actions taken against a member of his command, who filed an Inspector General (IG) complaint against him, were free of bias and prejudice. Once he and his leadership determined the member was no longer qualified to serve in his career field, the process began of serving administrative actions. The administrative actions taken over the course of two years under his command were not disciplinary actions but were consistent with the same actions taken by other commanders, to include units outside of the Air National Guard (ANG). These administrative actions were reasonable considering the member's lack of performance and suitability and would have been taken even if the protected communication had not taken place. The investigating officer (IO) and team failed to interview witnesses with personal and/or direct knowledge of events. Not one single member of his command staff was interviewed. The ROI contained several inaccuracies and missing evidence. Specifically, there are missing critical pieces of evidence that show actions taken against the member were consistent with policy, supported and approved by his chain of command, legally sufficient, and absent of reprisal. He did not singlehandedly take personnel actions against the member under his command. His leadership at all levels were involved in every step of the process and concurred with each action. Nevertheless, these individuals were never interviewed during the investigation. Throughout his entire command tour, he maintained a positive work environment, consistently up channeled information through his chain of command, and at no time did he take any command actions without receiving a legal review. His dedication, fairness, leadership style and position as commander are reinforced by the numerous character letters of support received.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is a currently serving ANG lieutenant colonel (O-5).

An Inspector General Office, during the period of 29 July 2016 through 16 October 2018, conducted a whistleblower restriction investigation to Title 10, United States Code, Section 1034,

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Controlled by: SAF/MRBC  
CUI Categories: Work-Product  
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*“Protected communications; prohibition of retaliatory personnel actions,”* which is implemented by Department of Defense Directive (DoDD) 7050.06, *“Military Whistleblower Protection,”* in response to a member’s fourteen (14) allegations of reprisal and two (2) allegations of restrictions. The following seven (7) allegations of reprisal and one (1) allegation or restriction were filed explicitly against the applicant.

#### **Allegation 4: Reprisal**

Between 5 March 2016 and 12 July 2017, the applicant failed to take appropriate action in response to [redacted] “Reply to the Notification of Intent to Demote” package in reprisal for his protected communications, with Members of Congress, Inspectors General, or members of his chain of command. **(NOT SUBSTANTIATED)**.

#### **Allegation 6: Reprisal**

Between 10 March 2017 and 19 July 2017, the applicant failed to ensure proper submission of [redacted] Fitness Assessment Appeals Board (FAAB) package in reprisal for his protected communications with Members of Congress, Inspectors General, or members of his chain of command. **(NOT SUBSTANTIATED)**.

#### **Allegation 7: Reprisal**

On or about 21 November 2016, the applicant completed a “Commander’s Memorandum to the Medical Evaluation Board (MEB)/Physical Evaluation Board (PEB)” concerning [redacted] which included unnecessary commentary to describe the impact of the member’s medical condition, in reprisal for his protected communication with Members of Congress, Inspectors General, or members of his chain of command. **(NOT SUBSTANTIATED)**.

#### **Allegation 11: Reprisal**

Between 6 April 2016 and 4 February 2018, the applicant engaged in a pattern of actions which constitutes a failure to take all necessary and proper measures to promote and safeguard the member’s wellbeing in violation of Air Force Instruction (AFI) 1-2, *Commander’s Responsibilities*, against [redacted] in reprisal for his protected communication with Members of Congress, Inspectors General, or member of his chain of command. **(NOT SUBSTANTIATED)**.

#### **Allegation 12: Reprisal**

On or about 19 January 2017, the applicant failed to review and extend or remove [redacted] temporary withdrawal of authority to bear firearms in reprisal for his communication with Members of Congress, Inspectors General, or members of his chain of command. **(SUBSTANTIATED)**.

#### **Allegation 13: Reprisal**

On or about 4 February 2018, the applicant recommended an indefinite withdrawal action request concerning [redacted] authority to bear firearms in reprisal for his communication with Members of Congress, Inspectors General, or members of his chain of command. **(SUBSTANTIATED)**.

#### **Allegation 14: Reprisal**

On or about 4 February 2018, the applicant denied reenlistment to [redacted] in reprisal for his communication with Members of Congress, Inspectors General, or members of his chain of command. **(SUBSTANTIATED)**.

#### **Allegation 15: Restriction**

On or about 20 July 2016, the applicant attempted to restrict [redacted] from making or preparing to make a lawful communication to an Inspector General. **(NOT SUBSTANTIATED)**.

On 21 August 2020, in response to an IG report, the applicant received a Letter of Reprimand (LOR) for forwarding a letter on or about 22 July 2016 to a Police Department Chief on Wing letterhead releasing a statement that was in violation of Air Force Instruction (AFI) 44-172, *Mental Health*. Specifically, in the absence of documentation providing a medical diagnosis, the applicant informed local authorities that [redacted] was “not mentally stable,” and should not have access to firearms. Also, the applicant further failed to meet his responsibilities on or about 4 February 2018, under AFI 31-117, *Arming and Use of Force by Air Force Personnel*, by initiating an AF Form 590, *Withdrawal or Reinstatement of Authority to Bear Firearms*, to indefinitely withdraw [redacted] authority to bear firearms in the military. The applicant was required on a weekly basis to review the status of assigned personnel with known mental, physical, or emotional issues that affect suitability to bear arms. No weekly review was conducted since July 2016, and no consideration was given to releasing protected health information (PHI) to the Police Department.

On 11 September 2020, the applicant responded to the LOR, indicating the release of limited health information to law enforcement is allowed to prevent or lessen a serious and imminent threat to the health or safety of a person or the public. Throughout the applicant’s review of [redacted] mental health status, he continuously sought the advice of the staff judge advocate (SJA) and the legal office concurred with the notification of his concern for [redacted] health and welfare to the Police Department. Moreover, the medical diagnosis referenced in the letter was provided to the applicant verbally by [redacted]. The LOR is unwarranted because he sought and followed advice from his SJA. The applicant’s decision was consistent with Air Force policy, influence by his training as a law enforcement officer and experience as a police officer. Moreover, his review of [redacted] status to bear arms was confirmed at least weekly until his official release from the veteran’s administrative hospital. Once the applicant was instructed to cease contact with [redacted] and he was assigned under another command, the review became that commander’s responsibility.

For more information, see the excerpt of the applicant’s record at Exhibit B and the advisories at Exhibits C and D.

#### **AIR FORCE EVALUATION**

MAANG/JA recommends denying the application. The applicant took numerous administrative actions involving a senior noncommissioned officer (SNCO) under his command. These actions apparently resulted in complaints by the SNCO against the applicant, which triggered an IG investigation. The applicant did not provide a copy of the IG ROI, which is the basis for his complaint. Therefore, a legal finding as to the validity or approval of the applicant’s complaint cannot be made without review of the IG ROI, including all attachments. However, the documentation provided does not prove evidence of an error or injustice and is insufficient to support the applicant’s claim.

The complete advisory opinion is at Exhibit C.

SAF/IG does not recommend the substantiated IG findings regarding the applicant be overturned or removed from the automated case tracking system (ACTS). There was a review and analysis of eight reprisal and restriction allegations framed against the applicant, in which three allegations of reprisal were substantiated. The reprisal and restriction complaints were fully processed in accordance with the Department of the Air Force Instruction (DAFI) 90-301, *Inspector General Complaints Resolution*, and Department of Defense Directive (DoDD) 7050.06, *Military Whistleblower Protection*, culminating with a final Department of Defense Inspector General (DoD IG) review and approval of the findings. Although there is evidence that does support the actions taken by the applicant were seemingly justified, a preponderance of the evidence further indicated the applicant took personnel actions because of the specific protected communication by a complainant. Taking any unfavorable actions directly due to a protected communication is a direct violation of 10 United States Code 1034, *Protected communications: prohibition of retaliatory personnel actions*. However, the additional evidence and information provided by the applicant does not change the preponderance of evidence as applied in this case.

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 15 February 2024 for comment (Exhibit E), and the applicant replied on 15 March 2024. In his response, the applicant contended the IO failed to provide sufficient evidence linking the alleged reprisal to the command actions taken. The investigation solely relied on three witness that did not work in his unit or were in his chain of command during his command tour. Each witness used terms such as "suggested" and "seemed" when describing his feelings towards [redacted], showing it was their personal feelings about the situation and not based on fact or evidence. None of the evidence supporting reprisal was obtained from individuals with direct knowledge, or that of his intentions. The applicant reiterated the inconsistencies that do not align with the allegations. For example, the IO stated there was a motive for reprisal for protected communications by placing and leaving [redacted] on the do not arm (DNA) roster. His member's placement was required by the AFI, and he was treated no differently than other members placed on the DNA roster.

In addition, the applicant refutes the allegations of motive for reprisal to separate [redacted] from military service and animosity towards him. The applicant stated he never wanted to discharge anyone; however, some people are not compatible with military service or things occur in their lives that leave them unable to serve. Although, he tried everything to help [redacted], the circumstances presented to him at the time caused [redacted] to be unable to continue his service.

The allegations indicate a close time frame between personnel action and awareness of [redacted] protected communication shows an inference of reprisal. However, there was a period of over 18 months between personnel actions taken against [redacted] from the knowledge of his protected communication. The personnel actions taken were at the end of a series of progressive actions to ensure the actions were taken in the best interests of all parties, including the unit and the member. Furthermore, the personnel actions taken would have occurred absent the protected communications. The IO falsely outlined the appearance of the applicant's motive as anger for [redacted] protected communication, his dislike for the [redacted], and a desire for [redacted] to be separated from military service. What the IO failed to assess was the motive of [redacted] for filing the protected communication. His initial filing of an IG complaint was against the group commander and the applicant's predecessor, well before his arrival. It was [redacted] attempt to use the IG process to eliminate accountability against himself. The thorough analysis reveals the claimed causal relationship in this reprisal case lacks substantive evidence.

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. While the applicant has support from his leadership, the Board concurs with the rationale and recommendation of MAANG/JA and SAF/IG and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board notes SAF/IG substantiated three of eight allegations of reprisal, and the reprisal/restriction complaints were processed in accordance with DAFI 90-301, *Inspector General Complaints Resolution*. Furthermore, we reviewed all the allegations of reprisal, restrictions, and evidence of record to reach our own independent determination of what occurred. While we noted some of the actions taken by the applicant appeared to be justified; there was a preponderance of the evidence that reflects the applicant took personnel actions based on the protected communication by the complainant, which is a direct violation of 10 USC § 1034. As such, we conclude the applicant has not established the adverse actions taken against him were unjust. While the applicant requested an LOC be removed from his OSR, the Board noted it is not in his available records for review or consideration. Therefore, in view of the above and in the absence of evidence to the contrary, we find no basis to recommend granting the relief sought in this application.
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-2023-01364 in Executive Session on 9 July 2024:

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, Panel Chair

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Panel Member

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Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 25 April 2023 and 9 May 2023.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, MAANG/JA, dated 10 October 2023.
- Exhibit D: Advisory Opinion, SAF/IGQ, dated 15 February 2024.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 15 February 2024.
- Exhibit F: Applicant's Response, w/atchs, dated 15 March 2024.
- Exhibit G: Whistleblower Reprisal Investigation, undated - WITHDRAWN.

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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.

10/30/2024

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Board Operations Manager, AFBCMR

Signed by: Work-Product