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

**RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2023-02335

Work-Product

**COUNSEL:** Work-Product

**HEARING REQUESTED:** NO

**APPLICANT’S REQUEST**

Her nonjudicial punishment (NJP) under Article 15, Uniform Code of Military Justice (UCMJ) be removed from her Officer Selection Record (OSR).

**APPLICANT’S CONTENTIONS**

Her NJP action dated, 28 May 13, indicated the Article 15 was never supposed to be included in her OSR; however, it was included, then removed from her OSR in Jan 14 due to her wing commander being removed from command for the same offense. Subsequently, due to policy changes implemented eight years after it was removed, the Article 15 was placed back into her OSR. The continued inclusion of the Article 15 in her OSR could negatively impact her selection on future promotion boards.

The applicant’s complete submission is at Exhibit A.

**STATEMENT OF FACTS**

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

On 28 May 13, according to AF Form 3070C, *Record of Nonjudicial Punishment Proceedings (Officer)*, the applicant was notified of her commander’s intent to recommend the wing commander impose NJP on her pursuant to Article 15, for one specification of an “Unprofessional Relationship,” in violation of Article 134, UCMJ. Specifically, between on or about 1 Nov 12 to on or about 22 Mar 13, she knowingly fraternized with an enlisted person, on terms of military equality, to wit: by having an unprofessional relationship.

On 30 May 13, the applicant indicated she had consulted with counsel, waived her right to court-martial and had attached a written presentation in response to the NJP.

On 5 Jun 13, the wing commander finalized his decision and found the applicant had committed one or more of the offenses alleged. For these violations, the wing commander imposed the punishment of a reprimand.

On 22 Jun 23, according to AFPC/JA’s memorandum, *Ten-Year Retention Rule*, AFPC/DP3SA was informed, in accordance with AFI 36-2907, *Adverse Administrative Actions* a review of the applicant’s Article 15 determined the exception to the retention rule was met and the adverse information should be retained permanently in the applicant’s OSR.

On 8 Jul 13, the applicant indicated she would not appeal but would submit matters on the OSR.

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According to AF Form 3070C, the wing commander indicated in Block 9, *Commander Action on Officer Selection Record*, his determination that this action will not be filed in her OSR, but will be filed in her Unfavorable Information File (UIF).

On 25 Jul 13, the applicant acknowledged she has been informed of the OSR decision.

On 22 Aug 13, the servicing staff judge advocate (SJA) found the record to be legally sufficient.

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

#### **APPLICABLE AUTHORITY/GUIDANCE**

On 26 Feb 21, the Secretary of the Air Force ordered a policy change via a Department of the Air Force Policy Memorandum (DAFPM) 2021-36-03 on *Adverse Information for Total Force Officer Selection Boards* to comply with Section 502 of the National Defense Authorization Act (NDAA) for Fiscal Year 2020, signed on 20 December 2019, as codified in title 10 United States Code, section 615(a)(3).

The new law, DoD policy, and subsequent Air Force policy require all adverse information to be filed in the officer's master personnel records group and OSR for consideration by both regular and reserve promotion selection, special selection, federal recognition, and selective continuation boards to the grade of O-4 and above, to include promotion processes to the grade of O-3 that involve adverse information that received significant media attention or is of interest to the Senate Armed Services Committee. These changes came into effect for all promotion boards convening on or after 1 Mar 2020 and include historic adverse information previously issued on or after 1 Jan 12 and Article 15s and approved court martial findings dated prior to 1 Jan 12. It further removed the authority for Wing commanders, delta commanders, or issuing authorities to direct removal of derogatory data from the OSR as previously permissible in AFI 36-2907, paragraph 3.4.3.1, and AFI 36-2608, *Military Personnel Records Systems*, paragraphs 7.10 through 7.12 (and their subparagraphs), 8.3.8, and 8.3.15 (and its subparagraphs). Adverse information that requires mandatory filing in the OSR and the MPerRGp includes, but is not limited to:

3. Nonjudicial punishment pursuant to Article 15, Uniform Code of Military Justice.

Moreover, the DAFPM states "waivers to this policy are not permitted" and all adverse information as defined by the policy will be permanently placed in the MPerRGp. Except for the set aside of a court-martial or NJP action, removal of adverse information from the MPerRGp may only be directed pursuant to the AFBCMRs recommendation.

As such the AFBCMR is now the sole removal authority for adverse actions. This is not a different type of review for the AFBCMR. Rather, it falls under the Board's existing review authority for corrections resulting from error or injustice.

Department of the Air Force Instruction (DAFI) 36-2907, 14 Oct 22,

1.2. Adverse Information for Total Force Officer Selection Boards Overview. All adverse information an officer receives will be filed in the OSR and will be considered by promotion selection, special selection, federal recognition (ANG specific), and selective continuation boards to the grade of O-4 and above (to include processes for O-3 promotions that have "extraordinary adverse information" per Department of Defense Instruction (DoDI) 1320.14, *DoD Commissioned Officer Promotion Program Procedures*).

1.2.4. All other adverse information filed in the OSR will remain in the OSR.

1.2.4.1. For O-6 and below boards and processes. For ten years, except for substantiated conduct, any single act of which, tried by court-martial, could have resulted in the imposition of a punitive discharge and confinement for more than one year. **(T-0)** If the exception is met, the adverse information will remain in the OSR. **(T-0)** Except for the set aside of a court-martial or nonjudicial punishment, earlier removal of adverse information from the OSR may only be directed pursuant to an AFBCMR recommendation.

1.2.5.2. MAJCOM and FLDCOM staff judge advocates will provide a separate memorandum articulating whether the officer's adverse information meets or does not meet the exception to the 10-year retention rule as outlined in paragraph 1.2.4 and paragraph 1.2.5.1 for retention beyond 10-years. The memorandum will be included with the command action documents submitted to the MPF, CSS, or equivalent personnel support function for inclusion in the MPerRGp.

2.2. The Standard of Proof for adverse administrative actions is a "preponderance of the evidence." This standard will be used when evaluating the evidence and every element of the alleged offenses.

#### **AIR FORCE EVALUATION**

AFPC/DPMSSM recommends granting the request. Based on the documentation provided by the applicant and analysis of the facts, there is evidence of an error or injustice. Based on the preponderance of the evidence, the applicant's commander issued her an Article 15. The adverse information documents were added to her record 10-years after the date of command action.

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 5 Sep 23 for comment (Exhibit D), but has received no response.

#### **ADDITIONAL AIR FORCE EVALUATION**

AFPC/DPMSSM revised their advisory opinion and now recommends denying the request. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice. According to DAFI 36-2907, for O-6 and below boards and processes, all adverse information filed in the OSR will remain in the OSR for 10-years, except for substantiated conduct, any single act of which, tried by court-martial, could have resulted in the imposition of a punitive discharge and confinement for more than one year. If the exception is met, the adverse information will remain in the OSR. Additionally, DAFI 36-2907 states MAJCOM staff judge advocates will provide a separate memorandum articulating whether the officer's adverse information meets or does not meet the exception to the 10-year retention rule as outlined in paragraph 1.2.4 and paragraph 1.2.5.1 for retention beyond 10-years. The memorandum will be included with the command action documents submitted to the MPF, CSS, or equivalent personnel support function for inclusion in the MPerRGp.

According to the memorandum addressed to AFPC/DP3SP, AFPC/JA reviewed the applicant's Article 15 and determined the adverse information does involve a single act, which if tried by

court-martial, could have resulted in the imposition of a punitive discharge and confinement for more than one year. Accordingly, the exception to the retention rule is met and the adverse information should be retained in the OSR permanently.

The complete revised advisory opinion is at Exhibit E.

**APPLICANT’S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 25 Sep 23 for comment (Exhibit F), 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. While the Board notes the conflicting advisory opinions prepared in this case, after thoroughly reviewing the application, the Board concurs with the rationale and recommendation of the AFPC/DPMSSM advisory opinion dated 19 Sep 23 and finds a preponderance of the evidence does not substantiate the applicant’s contentions. While the applicant contends her record should be expunged as the NJP indicated her commander determined it would not be filed in her Officer Selection Record, the Board notes the applicant clearly accepted the Article 15 and elected not to demand trial by court-martial. As such, the Board finds the NJP action was within the commander’s authority and the evidence presented does not demonstrate an error or injustice warranting removal of the NJP or show it was unjust or inaccurate as written. Additionally, the Board finds, in accordance with AFI 36-2608, *Military Personnel Records Systems*, the applicant’s adverse information meets the exception to the 10-year retention rule which requires the NJP be kept in the selection record permanently. Furthermore, the applicant’s circumstances are not unique compared to other similarly situated officers as the Congressional-mandate requires the military to furnish this type of adverse information for officers in the grade of O-4 and above to promotion selection boards. 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-2023-02335 in Executive Session on 12 Mar 24:

- Work-Product Panel Chair
- Work-Product Panel Member
- Work-Product Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 26 Jul 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPMSSM, dated 30 Aug 23.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 5 Sep 23.
- Exhibit C: Revised Advisory Opinion, AFPC/DPMSSM, dated 19 Sep 23.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 25 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.

7/2/2024

X *Work-Product*

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Board Operations Manager, AFBCMR

Signed by: *Work-Product*