



CUI//SP-MIL/SP-PRVCY

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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-02616

Work-Product

COUNSEL: *Work-Product*

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His nonjudicial punishment (NJP) under Article 15, *Record of Nonjudicial Punishment Proceedings*, of the Uniform Code of Military Justice (UCMJ) and his Officer Performance Report (OPR) for the reporting period of 18 Feb 15 to 8 Nov 15 be removed and expunged from his official military records.

APPLICANT'S CONTENTIONS

In an eight-page legal brief, to include a 22-page attachment containing supplemental materials, the applicant through counsel contends in accordance with the Retention Board's recommendation, the Letters of Reprimand (LORs) he was issued were removed from his OMPF and he believed the record of his NJP had also been removed. However, in Sep 21, he discovered his NJP record remained in his military record. Given the Retention Board approved the applicant be retained in the Air Force and removed the LORs from his record, justice also warrants the removal of his NJP and the referral OPR. He believes he has been punished enough and further punishment through the detrimental impact of their continued presence within his record is manifestly unjust and disproportionate to the conduct which led to the NJP action as they negatively impact furthering his career in the Air Force Reserve (AFR).

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is an AFR captain (O-3).

On 2 Oct 15, according to AF Form 3070C, *Record of Nonjudicial Punishment Proceedings (Officer)*, after consulting with counsel, waiving his rights to a court-martial and accepting NJP, electing not to present a written presentation, and electing not to appeal, the applicant was issued an Article 15, NJP, by the Commander, [unit] for violation of Article 133, *Conduct unbecoming an officer*, UCMJ and Article 134, *Being drunk and disorderly; Conduct of a nature to bring discredit upon the Armed Forces*. Specifically, the applicant was drunk and disorderly near or at his base; and upon failing to promptly pay a taxi fare and arguing with a taxi driver and eventually being escorted by Security Forces to two automated teller machines to obtain money to pay the fare, and under the circumstances, such acts constituted conduct unbecoming an officer and gentleman.

On 2 Oct 15, the applicant acknowledged the [unit]/CC decision to file the NJP action in the applicant's Officer Selection Record (OSR) and his Unfavorable Information File (UIF).

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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 15 Jan 16, according to AF Form 707, *Officer Performance Report*, for the period of 18 Feb 15 – 8 Nov 15, reflects in Block XI, *Referral Report*, the applicant received a referral OPR during the rating period for receiving an Article 15 action “for drunk and disorderly conduct while overseas.”

On 14 Nov 19, according to the memorandum, *Administrative Discharge*, <applicant’s name and unit>, provided by the applicant, the Air Force Reserve Command Commander (AFRC/CC), noting the Administrative Discharges Board’s determination there was a basis for discharge, but recommended the applicant be retained, approved the board’s findings and recommendation for retention, which terminated the discharge action against the applicant.

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

APPLICABLE AUTHORITY/GUIDANCE

On 26 February 2021, 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 Officer’s Selection Record 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, *Adverse Administrative Actions*, paragraph 3.4.3.1, and AFI 36-2608, *Military Personnel Records*, 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 Officer Selection Record (OSR) and the Master Personnel Records Group (MPerRGp) includes, but is not limited to:

1. Any substantiated adverse findings or conclusions from an officially documented investigation or inquiry, regardless of whether command action was taken as a result.
2. Approved court-martial findings of guilt (Court-martial Orders).
3. Non-judicial punishment pursuant to Article 15, Uniform Code of Military Justice.
4. Letters of Reprimand.
5. Letters of Admonishment.
6. Notices of Relief of Command (for cause).
7. Letters of Counseling related to a substantiated adverse finding or conclusion from an officially documented investigation or inquiry.

LOCs unrelated to a substantiated finding or conclusion from an officially documented investigation or inquiry will not be considered adverse information. This preserves commanders’ ability to administratively document and rehabilitate minor instances of substandard behavior or

misconduct without making it a part of the permanent record (also referred to as “standalone” LOCs).

Moreover, the DAFPM states that “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 an Air Force Board for Correction of Military Records (AFBCMR) 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.

Air Force Instruction 36-2608, *Military Personnel Records System*, dated 26 Oct 15, paragraph 7.11.2.3, the Article 15 is permanently retained in the MPerRGp unless set aside in its entirety IAW AFI 51-202, *Nonjudicial Punishment*, or its removal as directed by the AFBCMR.

8.3.15, Early Removal Procedures. The wing commander or issuing authority may request early removal of the LOR from the OSR.

AFI 36-3208, *Administrative Separation of Airmen*, 9 Jul 04 (Incorporating through Change 7, 2 Jul 13, Chapter 8, *Administrative Discharge Boards*, 8.1. Purpose, Function, and Duties. An administrative discharge board is a fact finding and recommending board. The functions and duties of a board appointed to consider an administrative discharge case are purely administrative, not judicial. The board's first duty is to develop and review all the information about the matter under consideration. It must reach clear, logical findings of fact as to each allegation set out in the notification memorandum. It does not make a finding concerning the member's medical qualification for worldwide duty. On the basis of its findings, the board recommends one or more actions to be taken in the case. If the board recommends discharge, it also makes separate recommendations as to: The type of separation: Whether the respondent should be offered an opportunity for probation and rehabilitation.

8.16. Findings and Recommendations. 8.16.2. The board is limited to making recommendations concerning separation or retention, type of separation, and suspension of discharge

AIR FORCE EVALUATION

AF/JAJI recommends denying the request. The applicant does not allege an error or injustice in the NJP itself, rather he alleges injustice in the re-entry of the NJP record in his OMPF. On 2 Oct 15, the [unit/CC] imposed NJP on the applicant pursuant to Article 15, UCMJ, for being drunk and disorderly in violation of Article 134, and having engaged in conduct unbecoming an officer and gentleman, in violation of Article 133, for an incident that occurred where the applicant was intoxicated, refused to pay a taxi fare causing Security Forces to be called and then after being returned to billeting, he began yelling and kicking at billeting windows. The commander punished him with a reprimand and filed the NJP in the applicant’s OSR. In Jul 16, the applicant committed additional misconduct by having an inappropriate relationship and fraternization and received a letter of reprimand (LOR).

Subsequently, an administrative hearing was conducted by an Administrative Discharge Board. Although the available record does not contain any documentation from this hearing, according to the applicant’s submission and verified by AFRC/CC’s 14 Nov 19 memorandum, the board

recommended retention. Additionally, according to the applicant, the board recommended his NJP be removed from his record and was done so, except it was re-entered into his record sometime later, although there is nothing in the available record regarding the NJPs removal or reentry.

On 26 Feb 21, the Secretary of the Air Force ordered a policy change via a Department of the Air Force Memorandum (DAFPM) 2021-36-03 on *Adverse Information for Total Force Officer Selection Boards* to comply with the new Congressional Mandates contained in the National Defense Authorization Act (NDAA) for Fiscal Year 2020 regarding the disclosure of military officers' adverse history. Further, according to the current instructions governing the removal of NJP records, Department of the Air Force Instruction (DAFI) 26-2608, *Military Personnel Records Systems*, dated 16 Apr 21, para. 6.9.1.2., the NJP is permanently retained in the eMPerRGp (Correspondence and Miscellaneous Group) unless set aside in its entirety in accordance with AFI 51-202, or its removal is directed by the Air Force BCMR.

The available record does not show when or pursuant to what authority his NJP was removed from his record, and they have reservations regarding his claim that based on the recommendation of the retention board the NJP was removed from his record as there is no verifying evidence. Further, even if assuming the NJP was appropriately removed, its' reentry in his record was done pursuant to Air Force and Congressional directives. In fact, current policy requires previously removed adverse information to be re-entered. In accordance with DAFI 36-2907, *Adverse Administrative Actions*, dated 14 Oct 22, paragraph 1.2.8, specifically addresses "historic adverse information" and states "this direction applies even in those situations in which a commander elected not to file the adverse information in an OSR or to where the adverse information was removed from an OSR pursuant to previous guidance <emphasis added>. Hence, any keeping or reentry of the applicant's NJP and/or LOR in his record complies with current policy requirements."

Therefore, based on the mandatory Air Force guidance and the applicant's history of repeated misconduct and after a careful review, they find no injustice.

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 25 Sep 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 DAF/JAJI and finds a preponderance of the evidence does not substantiate the applicant's contentions. While the applicant contends he has been punished enough and the continued presence of his NJP, as well as the referral OPR, within his record is manifestly unjust and disproportionate, the Board notes the applicant clearly accepted the Article 15 and elected not to demand trial by court-martial or appeal his commander's NJP decision. In addition, the Board determines his 8 Nov 15 OPR meets the criteria of AFI 36-2406, as the reference to his NJP is reasonably specific and clearly outlines the event/behavior of the applicant, to include the resulting action. While the applicant contends his

LORs, to include the NJP action and referenced OPR, were removed from his record in accordance with the Administrative Discharge Board's recommendation, the Board notes they have reservations regarding this claim as there is no verifying evidence as the available record does not contain any documentation from that hearing. Furthermore, the Board notes in accordance with AFI 36-3208, paragraph 8.16.2., the Administrative Discharge Board's authority is limited to making recommendations concerning separation or retention, type of separation, and suspension of discharge and not the adverse actions that may have led to the discharge recommendation. However, assuming the adverse actions were appropriately removed, it's reentry was done pursuant to Congressional-mandate, DoD and Air Force policies, which require all adverse information be filed in the officer's MPerRGp and OSR for consideration for promotion to the grade of O-4 and above. As such, the Board finds the evidence does not demonstrate an error or injustice warranting the removal of the NJP action or the referenced OPR as they were neither unjust nor inaccurate as written and fell well within the commander's authority. Moreover, the Board does not find the applicant's situation unique compared to other similarly situated officers who are subject to the same Adverse Information policy change in accordance with the FY20 NDAA. Therefore, the Board recommends against correcting the record.

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-2023-02616 in Executive Session on 13 Feb 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 15 Jul 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AF/JAJI, dated 22 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.

5/24/2024

X **Work-Product**

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