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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-02812

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT’S REQUEST

His Relief of Command memorandum dated 29 Dec 16, be expunged from his Master Personnel Records Group (MPerRGp) and his Officer Selection Record (OSR).

APPLICANT’S CONTENTIONS

He was wrongly removed from command. A Commander Directed Investigation (CDI) was conducted, and the Investigating Officer (IO) determined the finding to be NOT SUBSTANTIATED. Regardless of this finding, the wing commander directed he receive a referral Officer Performance Report (OPR) over the objection of his rater. Upon appeal to the Evaluations Reports Appeal Board (ERAB), the referral OPR was removed from his record and replaced by a Letter of Evaluation (LOE). The 26 Feb 21 change in policy requiring all adverse information to be filed includes: substantiated investigations, Nonjudicial Punishment (NJP), Letters of Reprimand (LORs), Letters of Counseling (LOCs) and he has none of these. Since the CDI findings were NOT SUBSTANTIATED, the CDI cannot be, and is not, in his MPerRGp. However, his MPerRGp contains the memorandum, *Relief of Command*, which should also be removed, because leaving it in his record is unfair and supports the original bias contained within his referral OPR, which the applicant reiterates was removed by the ERAB since there is no record of misconduct.

The applicant’s complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 2 Dec 16, according to memorandum, *Commander’s Inquiry of Wingman Deficiencies*, the Mission Support Group Commander (MSG/CC), with the concurrence of the Fighter Wing Commander (FW/CC) appointed an Investigating Officer (IO) to conduct a commander’s inquiry into the facts and circumstances surrounding events that took place between on or about 10 Dec 16 and on or about 11 Dec 16. Specifically, the IO was directed to determine if there were any wingman deficiencies prior to the Driving While Intoxicated (DWI) arrest of <redacted> on or about 11 Dec 16, in violation of AFI 1-1, *Air Force Standards*, dated 7 Aug 12. As a result of the CDI, the IO concluded the allegation of wingman deficiencies to be NOT SUBSTANTIATED.

On 21 Dec 16, according to memorandum, *Legal Review of Commander-Directed Inquiry Concerning Wingman Deficiencies*, the fighter wing staff judge advocate (FW/SJA) nonconcurred with the IO’s findings. While the SJA found the investigation to be legally sufficient, and the IO applied the ponderance of the evidence standard, they determined the IO’s conclusions were not

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supported by and consistent with the investigation's findings. Furthermore, they determined the preponderance of the evidence existed to support <applicant> violated AFI 1-1, paragraph 2.5 by failing to take actions in a situation where an airman appeared as if he was going to make a poor decision.

According to the *Relief of Command* memorandum, the FW/CC informed the applicant of his decision to remove him from command for cause in accordance with AFI 51-604, *Appointment to and Assumption of Command*, paragraph 14.2, effective 29 Dec 16.

On 15 Feb 17, according to a memorandum, *Notification of Substantiated Findings and/or Adverse Information against <applicant>*, the wing inspector general informed the 9AF, ACC and SAF IG offices of the adverse action taken (verbal counseling, LOR, Article 15) to relieve the applicant from command.

On 28 Nov 17, according to the *AFPC Eval Appeals BPO Tier 2 (DPMSPE) Case Form*, the applicant appealed to the ERAB to have his 3 Jan 17 OPR removed from his record. On 6 Mar 18, the ERAB approved the members application, and the evaluation was removed by order of the Chief of Staff, USAF and replaced by an AF Form 77, *Letter of Evaluation*, for the rating period ending 3 Jan 17.

On 12 Feb 24, according to a printout from the applicant's Statistical Analysis & Retrieval System + Retrieval Applications Website (STARS RAW) record, reflects he has been a squadron commander three additional times and has completed Naval War College in-residence.

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 OSR and the 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.

6. Notices of Relief of Command (for cause).

Department of the Air Force Instruction (DAFI) 51-509, *Appointment to and Assumption of Command*, 23 Dec 23, Paragraph 14, NOTE: Previously Air Force Instruction (AFI) 51-604, 11 Feb 16.

14. *Relief of Command*. Command is a privilege, not a right. As such, a superior competent authority may relieve an officer of command for any reason not prohibited by law or policy.

14.2. For Cause. An officer may be relieved of command for cause, including instances where the superior competent authority has lost confidence in the officer's ability to command due to misconduct, poor judgment, the subordinate's inability to complete assigned duties, the interests of good order and discipline, morale, the good of the organization, or other similar reasons.

14.2.1. A superior competent authority's decision to relieve a commander for cause must not be arbitrary and capricious.

14.2.1.2. If a specified cause for relief of command is later discovered, or determined by superior competent authority, to have been in error, the officer is not returned to command. The superior competent authority may initiate, or the officer may request that the superior competent authority issue, a memorandum for record recharacterizing the relief of command from "for cause" (paragraph 14.2) to "relief of command not for cause" (paragraph 14.1) or to a suspension (paragraph 14.3). The officer relieved in error may then use the memorandum in any appropriate forum (e.g., ERAB, Air Force Board for the Correction of Military Records) as support in seeking corrections to his/her personnel records.

Department of the Air Force Manual (DAFMAN) 1-101, *Commander Directed Investigations*, 9 Apr 21, Chapter 3, *General Considerations*, 1.3. *CDI Purpose*. The CDI is a tool to gather, analyze and record relevant information about matters of primary interest to those in command. The CDI is an extension of the commander's authority to investigate and to correct problems within the command. As such, the CDI is internal to the command concerned. There are two reasons a commander may want to conduct a CDI: to investigate systemic (or procedural) problems or to look into matters regarding individual conduct or responsibility. CDIs are administrative investigations.

1.4. Standard of Proof. The standard of proof for a CDI is preponderance of the evidence. A preponderance of the evidence is defined as the greater weight of credible evidence. When the greater weight of credible evidence supports the alleged events, it means the events as alleged are more likely than not to have occurred and the investigating officer (IO) may consider the events proven. While the amount of evidence is something to consider, less credible evidence will not trump a smaller amount of more credible evidence. Some additional things to consider when weighing the evidence are witness demeanor, opportunity for knowledge, bias, motive, intent, and the ability to recall and relate events. At all times, IOs must use their own common sense, life experiences, and knowledge of the ways of the world to assess the credibility of witnesses they interview and the evidence gathered in the investigation.

6.1.10.2. If there are no substantiated findings, or the steps of paragraph 6.1.10.1 result in no change to the findings, the initiating commander either "approves" or "disapproves" the CDI in writing. If the commander disagrees with one or more of the IO's findings and conclusions, the commander will:

6.1.10.2.1. Document the rationale for the disagreement and final determination on the matter in writing in an “addendum” to the ROI.

6.1.10.2.2. Follow the steps in paragraph 6.1.10.1, if the commander changes a not substantiated finding to substantiated, to include providing a redacted copy of the commander’s addendum to the subject as the basis of the substantiation.

DAFI 36-2608, *Military Personnel Records Systems*, dated 16 Apr 21, 2.2. *Creating Military Personnel Records*. Electronic Master Personnel Record Group. A document in the Electronic Master Personnel Record Group may be the original or the designated copy, and may be the only existing copy.

2.2.2.3. Required Adverse Documents. 2.2.2.3.1. Any substantiated adverse finding(s) or conclusion(s) from an officially documented investigation or inquiry, regardless of whether command action was taken as a result. This may include, but is not limited to, commander directed, Inspector General, and equal opportunity investigations.

DAFI 36-2907, *Adverse Administrative Actions*, dated 14 Oct 22, paragraph 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*).

1.2.8. Historic adverse information issued prior to the date of the implementation of this instruction will be filed in the MPerRGp. Subject to the rules in both paragraphs 1.2.4 and 1.2.5.1, on retention of adverse information in an OSR, select historic adverse information that was issued prior to the date of the implementation of this instruction, will also be filed in the OSR. This direction applies even in those situations in which a commander elected not to file the adverse information in an OSR or where the adverse information was removed from an OSR pursuant to previous guidance. Historic adverse information, not already contained in the MPerRGp or OSR that must now be filed includes each of the following:

1.2.8.1.3. Notices of Relief of Command (for cause) issued on or after 1 Jan 12.

AIR FORCE EVALUATION

AF/JAJI recommends denying the request. The applicant argues it is “unfair” to leave the Letter of Relief in his record as there is no adverse action to support his relief of command as the IO did not substantiate any allegations against him and the ERAB removed the referral OPR stemming from his relief of command from his record. Although not specifically stated in his application, what is really at heart of his request is his belief he was wrongfully removed from command. He alleges the decision was motivated by the FW/CC’s bias in using him as a scapegoat for his own culpability in the unfortunate events on the evening of 10-11 Dec 16.

The record reflects a CDI was conducted into the facts and circumstances surrounding the events of that evening and although the IO concluded any allegations of wingman deficiencies, specifically with regard to the applicant, were not substantiated, that is not the final say in the matter. A commander is free to disagree with an IO’s findings and conclusions. In accordance with DAFMAN 1-101, paragraph 6.1.10.2, the inquiry and written report were reviewed by the FW/SJA, and although found to be legally sufficient, the FW/SJA found the IO’s conclusions not

supported by the preponderance of the evidence. The FW/CC agreed with his legal counsel and took the very serious step of removing decision authority from the MSG/CC and relieved the applicant of command himself. The actions taken by the FW/CC were well within the bounds and scope of his legitimate command authority, as according to DAFMAN 1-101, paragraph 7.2, “the information obtained in a CDI, including the IO’s findings and recommendations, may be used in any administrative action against the individual, regardless of whether that individual was designated as a subject or suspect.” Additionally, DAFI 51-509, paragraph 14.2.1, specifically requires “A superior competent authority’s decision to relieve a commander for cause must not be arbitrary and capricious,” and in the context of correcting military records, an “unusually deferential application of the ‘arbitrary or capricious’ standard is applied. Under this deferential standard, they find the applicant’s assertions are no more than a disagreement with the FW/CC’s decision and the FW/CC was in the best position to evaluate the information available to him. Far from being arbitrary and capricious, the FW/CC’s conclusion was based on his direct knowledge as well as witness statements, to include the applicant’s, taken during the CDI.

Although the applicant contends there are no adverse actions or a substantiated Commander’s Inquiry underlying his relief of command for cause, relief of command for cause is not required to be proceeded or supported by any underlying action such as NJP, LOR, etc., or by a substantiated Commander’s Inquiry, CDI, or other investigation. Loss of confidence in an officer’s ability to command due to one or more of a variety of reasons, is sufficient. According to AFI 51-509, paragraph 14.2, “An officer may be relieved of command for cause, including instances where the superior competent authority has lost confidence in the officer’s ability to command due to misconduct, poor judgment, the subordinate’s inability to complete assigned duties, the interests of good order and discipline, morale, the good of the organization, or other similar reasons.” In addition, DAFI 36-2907, paragraph 1.2., states “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.” Finally, according to paragraph 1.2.1, Adverse information is any substantiated finding or conclusion from an officially documented investigation or inquiry or any other credible information of an adverse nature. To be credible, the information must be resolved and supported by a preponderance of the evidence. Adverse information includes but is not limited to: paragraph 1.2.1.6, *Notice of Relief of Command* (for cause). Therefore, in accordance with DAFI 36-2806, a *Notice of Relief of Command (for cause)* memorandum is filed in the applicant’s MPerRGP and OSR.

The ERAB is a separate process and the request to remove Relief of Command memo is not the same as the request to remove a referral OPR as there are different regulations involved and the ERAB could have determined there was justification for removal of his referral OPR for any number of reasons. While they requested access to the ERAB’s decision to review their rationale, the ERAB maintains records for only three years. As it is well past the three-year maintenance period, any attempt to glean the rationale for their decision would be mere speculation; therefore, they cannot presume it was for the reasons the applicant asserts to support his request.

Finally, the applicant indicates his next promotion board will be the first time the Relief of Command memo will be included in his OSR, and presumably taken into consideration. However, it is worth noting the applicant being relieved of command in 2016 has not stalled his career thus far; he has been promoted to lieutenant colonel, has held subsequent command billets, has been selected for in-residence professional military education, and finally, has continued to receive number one stratifications on his OPR’s just as he did before he was relieved.

Therefore, they recommend denying his request as they conclude there is insufficient evidence to demonstrate a material error or injustice and the applicant has provided no evidence of a material

error or injustice that would warrant removal of the Relief of Command memo from his personal records.

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 8 Dec 23 for comment (Exhibit D), and the applicant replied on 3 Jan 24. In his response, the applicant through counsel contended the decision to remove him from command was arbitrary and capricious as:

- a. The IO found the allegation of wingman deficiency to be NOT SUBSTANTIATED.
- b. The wing commander's involvement was biased, and he had a conflict of interest.
- c. The ERAB's decision to remove his referral OPR is persuasive precedent.

Furthermore, equitable relief is warranted because of the negative impact of the continued presence of the Relief of Command memo in his records. While the advisory notes that "the applicant being relieved of command...has not stalled his career thus far..." this statement is disingenuous; the reason his career has not been hampered is because the Relief of Command memorandum was not part of his official record prior to 14 Oct 22. As such, it now has an outsized impact on his future career progression. However, as the prerogative for this Board is not to idly stand-by when there is a material or injustice to correct, the applicant respectfully requests this material injustice be corrected, and the Relief of Command memorandum be removed from his record.

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 recommendations of AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant contends it is "unfair" to leave the Letter of Relief from Command in his record as there is no adverse action to support his relief of command as the IO did not substantiate any allegations against him and the ERAB removed the referral OPR stemming from his relief of command from his record. However, the Board disagrees. Although the allegations in the CDI were found unsubstantiated by the IO, this in and of itself does not exonerate the applicant of possible misgivings while in the position of command or alleviate him from his actions during the events that led to the CDI. Furthermore, the FW/SJA disagreed with the IO's conclusions and found that the preponderance of the evidence existed to support the applicant failed to act in a situation where an airman decided to drive home after consuming numerous alcoholic beverages. In this regard, there is no evidence to show the FW/CC made an arbitrary and capricious decision, but instead appears to have taken the appropriate steps to conduct a CDI, gather the evidence and obtain legal counsel to make an informed decision. Therefore, the actions taken by the WG/CC were well within the bounds and scope of his legitimate command authority, as according to DAFMAN 1-101, *Commander Directed Investigations*, 9 Apr 21, Chapter 3, *General Considerations* paragraph 7.2, "the information obtained in a CDI, including the IO's

findings and recommendations, may be used in any administrative action against the individual, regardless of whether that individual was designated as a subject or suspect.” As such, the wing commander agreed with the WG/SJAs conclusion and then took the serious step to remove the decision authority from the group commander and relieve the applicant from command. In addition, the Board agrees with AF/JAJI that the ERAB is a separate process and their decision to remove the referral OPR does not simply justify removing the Relief of Command memorandum. Moreover, relief of command for cause is not required to be proceeded or supported by any underlying adverse actions, or by a substantiated investigation, and the loss of confidence in an officer’s ability to command, due to a variety of reasons is sufficient. As such, the Board finds the FW/CC’s decision to remove the applicant from command was well within his authority and the evidence presented is insufficient to demonstrate a material error or injustice that would warrant removal of the Relief of Command memorandum from his record. 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-2023-02812 in Executive Session on 12 Mar 24:

- Work-Product** **wo...** 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 28 Aug 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AF/JA, dated 26 Nov 23.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 8 Dec 23.
- Exhibit E: Applicant’s Response, w/atchs, dated 3 Jan 24.

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.

7/4/2024

X **Work-Product**

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Board Operations Manager, AFBCMR
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