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

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03031

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

### APPLICANT'S REQUEST

His AF Form 911, Enlisted Performance Report (MSgt thru SMSgt) for the reporting period of 1 Oct 20 – 30 Sep 21, be removed from his official military record and replaced by an AF Form 77, *Letter of Evaluation* (LOE), for the period of 25 Sep 20 – 1 Dec 20, signed on 18 Oct 21.

### APPLICANT'S CONTENTIONS

He was retaliated against for speaking up when he saw something wrong and tried to correct deficiencies. He believes his flight commander, Maj <applicant>, did have sufficient knowledge he made an Abuse of Authority complaint to the Inspector General (IG) against both his Flight and Squadron leadership prior to his EPR closing out which resulted in him being marked down. Additionally, there is a chance that due to the investigation being over 600 days old, the findings could have been rushed at the end.

The Investigation Officer (IO) believes Maj <applicant> was reasonably unaware of the IG complaints filed by him until she was notified of the IG investigation in Nov 21. However, he believes the evidence demonstrates Maj <applicant> was aware he made Protected Communications (PCs) in the Abuse of Authority complaint, based on the testimonies from the Report of Investigation (ROI), prior to his EPR closeout date of 30 Sep 21. Had he been given the opportunity to respond to those testimonies, his response would have changed the findings of the case, and he has provided a plethora of evidence that supports his claim and proves he received an unfavorable EPR because of his PCs with the IG. Based on the evidence, he believes Maj <applicant> did have sufficient knowledge of his Abuse of Authority IG complaint prior to the closeout of his EPR and he has been retaliated against for speaking up and trying to correct deficiencies.

Throughout his career he has continued a path of sustained superior performance which is reflected in all his previous evaluations. He has attained 11 quarterly awards, one (1) wing award, and the Airman Leadership School Commandant Award. Therefore, he appeals for this evidence to be thoroughly reviewed and reevaluated and his AF Form 911, for the period of 1 Oct 20 – 30 Sep 21 be removed from his official military record.

The applicant's complete submission is at Exhibit A.

**AFBCMR Docket Number BC-2023-03031**

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Controlled by: SAF/MRB

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Limited Dissemination Control: N/A

POC: [SAF.MRBC.Workflow@us.af.mil](mailto:SAF.MRBC.Workflow@us.af.mil)

## STATEMENT OF FACTS

The applicant is an Air Force master sergeant (E-7).

On 6 Jul 21, according to the *Report of Investigation* (ROI), <redacted> *Fighter Wing Concerning Allegations of Restriction and Reprisal Within the <redacted> Medical Group, ACTS FRNO <redacted>*, dated 30 Aug 22, an Inspector General (IG) investigation was initiated in response to the applicant's: one (1) allegation of restriction (Allegation 1) and one (1) allegation of reprisal (Allegation 3) against his medical group's superintendent; and two (2) allegations (Allegation 2 and Allegation 4) of reprisal against his flight commander.

On 6 Oct 21, according to AF Form 911 for the rating period of 1 Oct 20 through 30 Sep 21, Section III, *Performance in Leadership/Primary Duties/Followership/Training*; Section IV, *Whole Airman Concept*; and Section V, *Overall Performance Assessment*, reflects the applicant received the rating of "Met All Expectations" from his rating official. On 8 Oct 21, both the additional rater and the commander concurred with the rater's assessment.

On 30 Aug 22, according to the ROI, the IO determined the reprisal allegations, Allegation 2 and Allegation 4, were NOT SUBSTANTIATED. Specifically, in regards to Allegation 2, the IO made the following analysis and determination:

**Allegation 2:** On or about 6 October 2021, Maj <applicant>, Medical Logistics Flight Commander, <redacted> MDSS, issued an unfavorable EPR to <applicant> in reprisal for making a PC with the IG on 6 Jul 21 and 13 Jul 21, in violation of 10 U.S.C Code § 1034 and DoDD 7050.06, *Military Whistleblower Protection*.

**Findings:** <Applicant> made a complaint of reprisal by Maj <redacted> for an unfavorable rating on his EPR, which he believed was in direct relation to his communication with the IG on 6 Jul 21 and 13 Jul 21. After interviewing the complainant, subjects and witnesses, it was determined based upon the totality of the circumstances, Maj <redacted> possibly did not have knowledge of <applicant> communication with the IG, but regardless, this knowledge did not appear to affect the decision to give an unfavorable rating on <applicant> EPR.

**Substantiation.** The timing between communicating with the IG and then receiving the EPR was considered but did not appear to be a relevant factor. It was found Maj <redacted> influenced this EPR; however, the stated reasons given by Maj <applicant> and SMSgt <redacted> for the contents of the EPR could not be reasonably proven to be related to the communication with the IG. Motive could not be proven concerning Maj <redacted> allegedly reprising against <applicant> for communicating with the IG. Witness testimony did not reveal any disparate treatment of <applicant> compared to others who did not communicate with the IG. Therefore, based on the preponderance of evidence, the allegation that Maj <redacted> issued an unfavorable EPR to <applicant> in reprisal for making a PC is NOT SUBSTANTIATED.

On 3 Apr 23, according to the memorandum from the <redacted> FW/IG to the applicant, per 10 USC § 1034(e), he was again notified of a delay in the completion of the ROI within the 180-days of the initiation of the investigation. The memorandum states this is the third notification concerning continuing delays as he was first notified on 2 Dec 21 via a 180-day Notification Letter and again on 7 Sep 21. Further, it acknowledges over 600 days have passed since his initial complaints of restriction and reprisal and provides the following timelines:

- a. On 25 Aug 22, the ROI was completed.

b. On 26 Aug 22, the ROI and evidence was submitted to the base's legal office for their legal sufficiency review.

c. On 13 Jan 23, the base legal office completed their review, and the ROI was forwarded to the MAJCOM IGQ for review, which revealed an administrative error in the ROI.

d. On 25 Jan 23, the error was resolved and sent back to the legal office for final review.

e. On 14 Mar 23, the legal office completed the final review.

f. The ROI is now in the final approval process before being routed through the IG channels for final review of the findings. Anticipate all reviews of the ROI will be completed within the next 90 days.

On 9 Jan 23, according to memorandum, *Legal Review of Restriction and Reprisal Investigation - <redacted>*, the Fighter Wing Staff Judge Advocate (FW/JA) found the ROI to be legally sufficient, stating "The IO correctly applied the preponderance of the evidence standard in arriving at its conclusions. The conclusions found in the ROI are supported by and consistent with the evidence."

On 8 May 23, according to memorandum, *Report of Investigation (ROI) for Allegations of Reprisal and Restriction under 10 U.S.C 1034 - <applicant> (ACTS FRNO <redacted>*, SAF/IGQ forwarded the ROI from the PACAF/IG to the IG, DoD/Whistleblower Reprisal Investigations stating "The investigating officer (IO) conducted an analysis of the evidence and determined the reprisal allegations were NOT SUBSTANTIATED and the restriction allegation was SUBSTANTIATED. Additionally, the IO found that abuse of authority did not take place. Further, "SAF/IGQ noted the investigation was reopened after an additional allegation of reprisal was brought against one of the subjects. The allegation was added after the subject interviews; however, based on the credible documented evidence and testimonies, the IO completed the analysis and found the allegation NOT SUBSTANTIATED." Lastly, it states "SAF/IGQ concurs with the IO findings. We submit this case for final DoD IG oversight in accordance with Title 10 USC § 1034."

On 10 Aug 23, according to AF Form 948, *Application for Correction/Removal of Evaluation Reports*, provided by applicant, he requested his EPR for the period of 1 Oct 20 – 30 Sep 21 be voided from his records.

On 16 Nov 23, according to email traffic, *Evaluation Reports Appeals Board (ERAB) Decision*, provided by applicant, he was informed the ERAB considered his application and was not convinced the original report was unjust or wrong, and denied his request.

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

Department of the Air Force Instruction (DAFI) 90-301, *Inspector General Complaints Resolution*, 4 Jan 24:

4.17. Standard of Proof. 4.17.1. The standard of proof applicable to IG investigations 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 IO may consider the events proven.

4.18. Analyzing the Evidence. Keeping in mind the standard being sought (preponderance of the evidence), IOs will follow a four-step process when analyzing the evidence they collected: 4.18.1. What are the allegations? 4.18.2 What are the facts (what happened)?; 4.18.3. What standards apply? and 4.18.4. Were the standards violated (was a rule, regulation, policy, or law broken)?

4.19. Category of Findings. There are only two possible findings for each allegation:

4.19.1. **Substantiated:** A substantiated finding results when a preponderance of the evidence supports the allegation of a wrong or violation of law, regulation, procedure, or Department of the Air Force policy or standard. The facts indicate a violation of standards occurred.

4.19.2. **Not Substantiated:** A not substantiated finding results when a preponderance of the evidence supports the conclusion the alleged misconduct did not occur. The facts indicate no violation of standards occurred.

5.6.2. IAW DoDD 7050.06, the owning IG must provide a 180 Day Notification Letter to IG DoD (through SAF/IGQ) and to the complainant if the investigation is not completed within 180 days after the initiation of the investigation (tasking date in ACTS) and every 180 days thereafter. **(T-0)** The letters must include the reasons for the delay, an estimated time of completion for the investigation, and a copy must be included in the ACTS case file. IGs must also comply with Department of the Air Force requirements for periodic updates as specified in paragraph 4.22 of this instruction.

## AIR FORCE EVALUATION

AFPC/DP3SP recommends denying the request. The applicant has not substantiated the contested EPR was not rendered in good faith by all evaluators based on the knowledge at the time. He contends he received an unfavorable EPR due to reprisal for submitting an abuse of authority case with the IG. However, he has not provided any substantiating documentation or evidence to prove his claim of reprisal for receiving an unfavorable EPR or the EPR was rendered unfairly or unjustly. Further, the IO determined in the ROI the allegation concerning the contested EPR to be Not Substantiated. Air Force policy is that an evaluation report is accurate as written when it becomes a matter of record. Additionally, it is considered to represent the rating chain's best judgment at the time it is rendered. To effectively challenge an evaluation, it is necessary to hear from all members of the rating chain, not only for support, but also for clarification/explanation. Although he provided character references/statements, these failed to provide any factual or credible source of firsthand knowledge of incident of reprisal. In addition, he failed to provide the necessary information/support from any rating official on the contested EPR. Without the benefits of these statements, they can only conclude the EPR is accurate as written. Once a report is accepted for file, only strong evidence to the contrary warrant correction or removal from an individual's record. The burden of proof is on the applicant. To void this report would remove the accountability of the applicant for this reporting period.

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 20 Jun 24 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 thoroughly reviewing all Exhibits, to include the Report of Investigation, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendation of AFPC/DP3SP and finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant contends he received an unfavorable EPR due to reprisal for submitting an abuse of authority complaint to the Inspector General. However, the Board disagrees and finds he has not provided any substantiating documentation or evidence to support his claim of reprisal and concurs with the investigating officer's determination that the allegation of abuse of authority was not substantiated. Additionally, the Board notes to effectively challenge the EPR, it is necessary to hear from all members of the rating chain for support and clarification. As such, the applicant has failed to provide any supporting evidence from his rating chain for the Board to conclude that the EPR is not accurate as written. 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-2023-03031 in Executive Session on 10 Dec 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 18 Sep 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DP3SP, dated 11 Jun 24.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 20 Jun 24.

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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.

3/31/2025

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Board Operations Manager, AFBCMR

Signed by:

*Work-Product*

**AFBCMR Docket Number BC-2023-03031**

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