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

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03148

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COUNSEL: Work-Product

HEARING REQUESTED: NO

### APPLICANT'S REQUEST

1. The Air Force Office of Special Investigation (OSI) Report of Investigation (ROI) against him be deemed not substantiated.
2. The Letter of Reprimand (LOR) and Unfavorable Information File (UIF) be removed. **(The LOR and UIF are not in the applicant's Master Personnel Record Group).**
3. The referral Enlisted Performance Report (EPR) be removed. **(The applicant did not exhaust all available non-judicial relief with the Evaluation Reports Appeals Board before applying to the Board).**

### APPLICANT'S CONTENTIONS

On 6 Jan 22, the applicant was arrested for allegations he assaulted his spouse. The charges filed against him were quickly dismissed due to the lack of any credible evidence, which relied solely on his spouse's account after she first attacked him, and he had to defend himself. His spouse was unwilling to participate in the court process and after consultation with her Special Victims Counsel, she ultimately recanted her allegations via written memorandum. Despite the nolle prosequi action and the clear recantation, the applicant's command still issued him an LOR, placed him on the control roster, and established a UIF. They attempted to demote him and deny his reenlistment both of which actions were deemed legally impermissible and were successfully appealed. His command ultimately issued him a referral EPR. The arrest and subsequent charges have since been expunged from his civilian record. Despite the decision not to pursue charges by the county prosecutor, AFOSI conducted its own investigation and substantiated the allegations. Pursuant to this investigation, his wife interviewed with AFOSI on 7 Jan 22 and 10 Jan 22. Her multiple accounts contain significant inconsistencies that undermine her credibility and should cause one to question the veracity of her report.

The applicant's complete submission is at Exhibit A.

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## STATEMENT OF FACTS

The applicant is a currently serving staff sergeant (E-5).

On 6 Jan 22, according to a sheriff's case report, provided by the applicant, an officer responded to the applicant's residence for reported domestic violence.

On 22 Mar 22, according to the OSI ROI, an incident of domestic violence was investigated based on information from the Family Advocacy Program (FAP), stating on 6 Jan 22, the applicant strangled his spouse. The applicant was arrested and charged with first- and second-degree assault. The ROI was referred to the action authority for disposition.

On 20 Apr 22, according to the District Court of Maryland findings, the court's verdict for first- and second-degree assault was Nolle Prosequi.

On 4 May 22, according to a memorandum extracted from the ROI, the applicant received an LOR for assaulting his spouse. On 9 May 22, the applicant responded to the LOR stating in part that he was not convicted of any of the charges and the court dismissed all charges against him. The applicant states he was defending himself against a vicious attack against his spouse. On 9 May 22, the commander decided to maintain the LOR.

On 9 May 22, according to AF Form 1058, *UIF Actions*, extracted from the ROI, the applicant's commander established a UIF and placed him on the control roster due to receiving an LOR for domestic violence assault.

On 2 Jun 22, according to AF Form 1137, *UIF Summary*, extracted from the ROI, the applicant was placed on the control roster with an interim disposition date of 8 Nov 22 and a final disposition date of 8 May 23.

On 24 Jun 22, according to information provided by the applicant, his spouse recanted all previous statements made by her that could implicate the applicant in any misconduct. She recognized that without her statements, it could impact the ability to take further action against the applicant. She requested any disciplinary or administrative action taken, based in whole or part, on her statements be rescinded. She also requested no further disciplinary action be taken against the applicant and she declined to participate in any administrative separation proceedings.

On 27 Jun 22, according to a memorandum for record, on 2 Jun 22, the applicant was notified of the commander's intent to recommend he be demoted. Based on a review of the evidence, the applicable Air Force regulations and a statement from the applicant's spouse, the commander terminated the demotion action without further action.

On 31 Aug 22, according to AF Form 1058, *UIF Actions*, extracted from the ROI, the commander decided to remove the applicant from the control roster early.

On 26 Sep 22, according to a memorandum from the applicant's commander's dated 13 Oct 22, extracted from the ROI, the Article 128, Aggravated Assault (Domestic Violence/Strangulation) offense investigated by the OSI resulted in an LOR with a UIF and placement on the Control Roster. The applicant was also processed for administrative Air Force Specialty Code (AFSC) removal due to the nature of the offense committed.

On 3 Oct 22, according to the applicant's AF Form 418, *Selective Reenlistment Program (SRP) Consideration/Denial of Continued Service for Airmen*, the applicant's commander did not select him for reenlistment due to the LOR and UIF dated 4 May 22. On 6 Oct 22, the applicant submitted an appeal. On 12 Dec 22, the applicant's commander approved his appeal, and his reenlistment eligibility was restored.

On 18 Oct 22, according to AF Form 590, *Withdrawal/Reinstatement of Authority to Bear Firearms*, the authority for the applicant to bear firearms and be issued ammunition was withdrawn for being in violation of Security Forces requirements and AFI 31-117, *Arming and Use of Force*.

On 30 Jan 23, according to an AF Form 2096, *Classification/On-The-Job-Training Action*, dated 9 Feb 23, the applicant's Security Forces AFSC was withdrawn

On 18 Apr 23, according to the applicant's DAF Form 910, *Enlisted Performance Report*, for the period 1 Feb 22 thru 31 Jan 23, the applicant received a referral EPR because he "Displayed poor judgment; received LOR/UIF/Control Roster from January arrest f/domestic dispute—AFSC removed." On 31 Mar 23, the applicant responded to the referral EPR.

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

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

DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 3.3, states in part, before applying, applicants must exhaust all other available administrative remedies (e.g., performance reports, Evaluation Reports Appeals Board). Otherwise, the Executive Director of the AFBCMR or designee will administratively close the case, without prejudice, and return it without action.

AFI 36-2406, *Officer and Enlisted Evaluation Systems*, provides instructions for submitting requests for correction to the Evaluation Reports Appeal Board (ERAB), which was established to provide an avenue of relief for correcting errors or injustices in evaluations at the lowest possible level.

#### **AIR FORCE EVALUATION**

AFPC/DPMSSM recommends denying the applicant's request to remove the LOR. There is insufficient evidence of an error or injustice. The commander administered the LOR in accordance with DAFI 36-2907, *Administrative Adverse Actions*, chapter 3. The applicant was issued an LOR

on 4 May 22 for assaulting his spouse. The assault resulted in him being arrested and charged with first- and second-degree assault. He acknowledged receipt and understanding of the LOR on 4 May 22. The 3rd indorsement of the LOR reflects the commander's decision to sustain the LOR, file in the applicant's UIF, and be placed on the control roster. The applicant acknowledged receipt and understanding of the indorsement on 16 May 20.

The applicant was not convicted of the charges and the case was dismissed by the court due to his wife's failing to appear in court. The arrest and subsequent charges were expunged from the applicant's civilian record. AFOSI also interviewed the applicant's spouse and in their ROI, dated 22 Mar 22, substantiated the allegations. In a subsequent interview with the applicant's wife on 24 Jun 22 she recanted her allegations against the applicant in a written memorandum.

Per Table 3.2, rules 2 and 4, Control Roster and UIF's generated due to LOR, expire one year from the date the commander signs Section V of the DAF Form 1058. There should no longer be a record of adverse action in applicant's record. The Special Programs section reviewed the applicant's Master Personnel Record Group and documentation of the adverse administrative action does not exist. Additionally, the Military Personnel Data System does not reflect LOR/UIF/Control Roster. If it exists, recommend any adverse administrative action maintained at local level be purged from the applicant's record. Please refer any questions regarding whether the commander's actions were warranted or met legal sufficiency with the staff judge advocate.

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 Jan 24 for comment (Exhibit D), and the applicant replied on 29 Jan 24. In response, counsel contends the advisory opinion, states "[t]here should no longer be a record of adverse action in the applicant's record." Nevertheless, the applicant received a referral EPR, which contained remarks concerning the LOR. Specifically, Part V, Block 2, *Comments* states, "Displayed poor judgment, received LOR/UIF/Control Roster from January arrest f/domestic dispute—AFSC removed." Accordingly, there is still a record of adverse action in the applicant's permanent record that is unwarranted. Such comments will continue to adversely affect the applicant's promotion and advancement in the Air Force; accordingly, their inclusion, which is based upon a recanted allegation of domestic violence, is a substantial injustice.

The applicant's complete response is at Exhibit E.

#### **FINDINGS AND CONCLUSION**

1. The application was timely filed.
2. The applicant did not exhaust 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 to warrant changing the AFOSI investigation to reflect it was not substantiated. The Board concurs with the rationale and recommendation of AFPC/DPMSSM and finds a preponderance of the evidence does not substantiate the applicant's contentions. With respect to the applicant's request to remove the contested EPR, the applicant's failure to exhaust all available remedies renders any potential action by the Board premature. In particular, the applicant has not presented his case to the Evaluation Reports Appeal Board (ERAB), which would be able to review the case fully and, if warranted, provide relief. Therefore, the Board recommends against correcting the applicant's record at this time.

## 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. The Board also recommends informing the applicant other avenues of administrative relief remain available for his EPR, and the Board will reconsider the application only upon receipt of documentary evidence that such relief has been exhausted.

## 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-2023-03148 in Executive Session on 24 Sep 24:

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 19 Sep 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPMSSM, dated 18 Dec 23.
- Exhibit D: Notification of Advisory, SAF/MRBC to Counsel, dated 5 Jan 24.
- Exhibit E: Applicant's Response, w/atchs, dated 29 Jan 24.
- Exhibit F: Office of Special Investigations ROI, dated 22 Mar 22 (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.

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