



Work-Product

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

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03598

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

### APPLICANT'S REQUEST

His 2021 Enlisted Performance Report (EPR) be removed from his record.

### APPLICANT'S CONTENTIONS

His 2021 EPR be voided due to violations and improper interpretations of Air Force Instruction (AFI) 36-2406, *Officer and Enlisted Evaluation System*. In the addendum to the Report of Investigation (ROI) Work-Product the PACAF Inspector General (IG) recommended he petition the AFBCMR to "make a determination regarding the propriety of documenting complainant's alleged sub-par performance from the 2020 reporting period on the complainants 2021 EPR." As the PACAF IG noted, both his rater and additional rater failed to acknowledge he had been reassigned to another duty in 2021 and failed to ascertain his performance there. His rater never provided the required performance feedback and did not establish performance expectations. Additionally, both the rater and additional rater improperly applied the state of the flight personnel and programs to his 2021 evaluation even though he had been removed from all managerial and leadership aspects of the organization while he was permanently detailed to the Marine Corps COVID-19 Response Center.

He applied to the Evaluation Report Appeals Board (ERAB) to have his 2021 EPR removed, as Section III, *Performance in Leadership/Primary Duties/Followership/Training*, and Section V, *Overall Performance Assessment*, were marked down due to a Letter of Reprimand (LOR) and Unfavorable Information File (UIF) he received for an incident that occurred during the 2020 rating period. However, through the UCMJ Article 138, *Formal Complaint Process*, he appealed to the 5th Air Force (5AF/CC), who granted his request and revoked the LOR and UIF. The revoked LOR and UIF, combined with the proof of his Midterm Feedback, character letter, and Navy and Marine Corp Commendation Medal clearly demonstrated he exceeded expectations in all assessed categories. Although he was denied relief because his IG complaint was unsubstantiated, the IG referred him to the AFBCMR due to the circumstances of his case.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is an Air Force senior master sergeant (E-8).

On 2 Aug 21, the applicant was awarded the Navy and Marine Corps Commendation Medal for meritorious achievement while serving as the 18th Wing Novel Coronavirus Disease 19 Liaison Officer assigned to the Joint Novel Coronavirus Disease 19 Response Center, Task Force Safeguard, and as a Case Intelligence Analysts from Aug 2020 to July 2021.

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Work-Product

Controlled by: SAF/MRB  
CUI Categories: Work-Product  
Limited Dissemination Control: N/A  
POC: [SAF.MRBC.Workflow@us.af.mil](mailto:SAF.MRBC.Workflow@us.af.mil)

On 24 Aug 21, according to AF Form 911, *Enlisted Performance Report (MSgt thru SMSgt)*, for the period of 1 Aug 20 – 31 Jul 21, Block I, *Ratee Information*, Block 5, *Organization, Command, and Location*, reflects: 18<sup>th</sup> Civil Engineer Squadron (PACAF), Kadena Air Base, Japan. Section III, *Performance in Leadership/Primary Duties/Followership/Training*, Block 1, *Mission Accomplishment* and Section V, *Overall Performance Assessment* reflect: “Exceeded some, but not all expectations.” On 25 Aug 21, his additional rater concurred.

On 12 May 22, according to the documents provided by the applicant, he was notified his ERAB application was returned without action as the application was missing required evidence from a neutral third party, such as a Substantiated IG or EO complaint, and recommended he file an IG complaint and if substantiated to resubmit his evaluation appeal.

On 23 Jan 23, the 18th Wing Inspector General released the results of the ROI **Work-Product** with the following findings:

Work-Product

- a. Allegation 1. On or about 4 August 2022, Lt Col -----, Commander, ----- Squadron, denied applicant’s request to amend the ratings on his EPR in reprisal for a PC in violation of 10 USC § 1034. **FINDING: NOT SUBSTANTIATED.**
- b. Allegation 2. On or about 25 August 2021, Lt Col -----, Commander, ----- Squadron, concurred with marking applicant’s EPR “Exceeded some, but not all expectations” in two sections in reprisal for a PC in violation of 10 USC § 1034. **FINDING: NOT SUBSTANTIATED.**
- c. Allegation 3. On or about 12 September 2022, First Lieutenant -----, Commander ----- Squadron, denied the applicant’s request to amend the ratings on his EPR in reprisal for a PC in violation of 10 USC § 1034. **FINDING: NOT SUBSTANTIATED.**
- d. Allegation 4. On or about 24 August 2021, First Lieutenant -----, Commander, ----- Squadron, marked the applicant’s EPR “Exceeded some, but not all expectations” in two sections in reprisal for a PC in violation of 10 USC § 1034. **FINDING: NOT SUBSTANTIATED.**

On 30 Jul 23, according to the PACAF Addendum to the ROI, **Work-Product** summary, provided by the applicant, PACAF/IGQ reviewed ACTS FRNO **Work-Product** and concurred with the Investigating Officer's (IO) findings of **NOT SUBSTANTIATED** for all allegations addressed in the ROI; however, the reprisal analysis documented by the IO in the ROI did not properly address the elements of reprisal as required by AFI 90-301, par 5.4 and par 5.6.6. Stating, this Addendum addresses four Protected Communications (PC) not identified by the IO, provides revised reprisal analysis conducted by PACAF/IGQ, and addresses four case issues with the original ROI identified by PACAF/IGQ that were not addressed in the ROI dated 23 Jan 23. Additionally, while the addendum notes errors and anomalies, it states these errors and anomalies do not affect the overall findings of the investigation. However, PACAF/IGQ included the following statement regarding Case Issue 4:

“Throughout the reprisal analysis, the IO focused on complainant's poor management of programs and equipment, training of subordinates, and "bad reputation" as the reasons for the markings on complainant's 2021 EPR. However, although the IO mentioned the facts that Capt [the applicant’s flight commander and rater] never provided required performance feedback to complainant, did not establish performance expectations with complainant, and did not contact JCRC leadership in order to ascertain complainant's performance while assigned there, the IO did not consider any of these facts in his reprisal

analysis other than to state he believed complainant's EPR was administratively mishandled and that testimony indicated complainant's performance while assigned to the JCRC was "stellar." Additionally, the IO did not discuss the facts no one other than Capt ----- expected complainant to perform in the role of CEX Flight Superintendent while assigned to the JCRC and that Lt Col ----- and Capt ----- were unaware of complainant's alleged mismanagement of flight programs until after the end of the 2021 reporting period. The following excerpt of Lt Col ----- testimony indicates that in hindsight, he recognized that complainant's alleged sub-par during the 2020 reporting period should perhaps not have been addressed in complainant's 2021 EPR."

**"Recommendation:** Although it is non-standard for PACAF/IGQ to make recommendations for not substantiated allegations in an ROI or addendum, in this case, based on the circumstances and testimony cited above, PACAF/IGQ recommends the complainant petition the Air Force Board for the Correction of Military Records to make a determination regarding the propriety of documenting complainant's alleged sub-par performance from the 2020 reporting period on complainant's 2021 EPR."

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

#### APPLICABLE AUTHORITY/GUIDANCE

AFI 36-2406, *Officer and Enlisted Evaluation System*, 14 Nov 19, 1.12.3.1. *Duty History or Performance Outside the Current Reporting Period*. Do not comment on duty history or performance outside the current reporting period, except as permitted by paragraphs 1.12.3.4 and 1.12.4.1.

1.12.3.4. *Prior Events*. Events that occurred in a previous reporting period that add significantly to the evaluation, were not known to and considered by the previous evaluators, and were not already reflected in a previous evaluation in the permanent record (this includes EPRs, OPRs, LOEs, and TRs) can be included in a subsequent evaluation. **(T-1). Example:** An event (positive or negative) which came to light *after* an evaluation became a matter of record, but which occurred *during* the period of that evaluation, could be mentioned in the ratee's *next* evaluation because the incident was not previously reported. In rare cases, serious offenses (such as those punishable by courts-martial) may not come to light or be substantiated for several years. In such cases, inclusion of that information may be appropriate even though the incident/behavior occurred prior to the last reporting period. Additionally, negative incidents from previous reporting periods involving the character, conduct, or integrity of the ratee that continue to influence the performance or utilization of the ratee may be commented upon *in that context only*. Commanders and Senior Raters make the determination of what constitutes a significant addition. If a commander has considered and made a decision not to comment on a known adverse action, an incumbent commander may not overturn a previous commander's decision by requesting the adverse action be added after the evaluation has been made a matter of record, nor may the incumbent commander include it in the next evaluation. **(T-1).** However, if the behavior has continued into the next rating period, an evaluator may comment on the specific behavior for that rating period.

1.12.4.1. *Conduct Based on Unreliable Information*. 1.12.4.1.1. Raters must ensure that information used to document performance, especially derogatory information relating to unsatisfactory behavior or misconduct, is reliable and supported by a preponderance of the evidence. 1.12.4.1.4. When it is determined that such conduct is appropriate for comment, refer to the underlying performance, behavior or misconduct itself and not merely to the fact that the

conduct may have resulted in a punitive or administrative action taken against the member (such as a letter of reprimand, Article 15, court-martial conviction).

2.2.1. The ratee will: 2.2.1.3, Provide timely notification to the rater and, if necessary, the rater's rater, when required or requested feedback did not take place.

2.6.3. Since the ratee shares the responsibility to ensure Airman Comprehensive Assessment (ACA) sessions are conducted, the ACA notice is also sent to the ratee, 30 calendar days after sending the notice to the rater (for officers) or concurrently with the notice sent to the rater (for enlisted).

10.2.1.3. Evaluations that have become a matter of record are presumed to be accurate and objective. Applicants filing an appeal must provide evidence that clearly demonstrate an error or injustice was made.

Table 10.2. Correcting Minor Errors on Evaluations.

R	Minor Errors
U	<p>Note: Once a digitally signed evaluation has been transmitted to AFPC or ARPC, only AFPC or ARPC is authorized to make the correction. Submit an ERAB request via the vMPF/myEval.</p> <p>The error is considered minor if the request is to correct an error in:</p>
L	
E	
1	<p>The ratee's identification data:</p> <p>Name, grade, social security number, (component, ANG and AFR only), organizational element, or the identification data of an evaluator who signed the evaluation.</p> <p>Name, grade, social security, duty title, organizational element, date of signature, or final evaluator's position.</p> <p>Education or promotion or TIG/TIS eligible blocks.</p> <p>See Notes 1, 2, and 3. Go to Table 10.3.</p>

A2.3. Statements. The most effective evidence are statements from the evaluator(s) who signed the contested evaluation. These statements should: Cite important facts or circumstances that were unknown when the evaluators signed the evaluation; Detail the error or injustice; Explain how and when it was discovered; Include the correct information; Relate to the contested reporting period; and address the allegations and substantially challenge or disprove comments or ratings in the evaluation.

A2.5.8. Lack of Counseling or Feedback. The lack of counseling or feedback, by itself, is not sufficient to challenge the accuracy or validity of an evaluation. Documentation should provide specific information about how the lack of counseling or feedback resulted in the unfair evaluation so the board can make a reasoned judgment on the appeal. Finally, every Airman should know the existing standards for indebtedness, weight, fitness. Lack of counseling in these areas provides no valid basis for voiding an evaluation.

## AIR FORCE EVALUATION

AFPC/DP3SP recommends denying the request. The applicant has not provided compelling evidence to show the report was unjust or inaccurate as written at the time. The applicant contends his 2021 EPR is unjust, had improper leadership supervision and was in violation of AFI 36-2406 as his rating of “Exceeded some, but not all expectation” was in reprisal for having protected communications with the IG. Overall, while the ROI found none of the applicant’s allegations were substantiated, and there was no evidence to suggest the applicant’s rater and additional rater deliberately reprised against him, the ROI did find the applicant should have received a Letter of Evaluation (LOE) for his time at the Joint COVID-19 Response Center (JCRC), and the EPR’s Section I, Block 5, should have included “with Duties at JCRC.”

A review of the applicant’s evaluation included annotated “bullets” from his time at the JCRC. Therefore, in accordance with AFI 36-2406<sup>1</sup>, paragraph 1.7.1.1.6, “If a member is performing duty in an organization other than their assigned PAS code, enter the assigned information, followed by “with duty at . . .” to indicate the organization where the ratee performed duty” and AFI 36-2406<sup>2</sup>, Table 10.2, Rule 1, a minor administrative correction can be accomplished to add “with duties to JCRC” in Section I, Block 5.

If the applicant was concerned about his lack of feedback, there were avenues available to him to resolve the issue. According to AFI 36-2406<sup>3</sup>, paragraph 2.2.1.3, “it is the ratee’s responsibility to notify the rater, and if necessary, the rater’s rater, when required or requested feedback did not take place” and the applicant does not appear to have sought any remedies from the additional rater. The ROI states according to the applicant, he “decided not to take the initiative and waited to see if his supervisor was going to do his job without him prodding him.” Furthermore, AFI 36-2406<sup>4</sup>, paragraph 2.6.3, states “since the ratee shares the responsibility to ensure performance feedback sessions are conducted, the notice is also sent to the ratee concurrently with the notice sent to the rater.”

While documented feedback sessions are required, they do not replace informal day-to-day feedback. A rater’s failure to conduct a required or requested feedback session, or document the session on a performance feedback worksheet, does not invalidate the performance report. Furthermore, in accordance with AFI 36-2406<sup>5</sup>, paragraph A2.5.8, “while current Air Force policy requires performance feedback for personnel, a direct correlation between information provided during feedback sessions and the assessments on evaluation reports does not necessarily exist. For example, if after a positive feedback session, an evaluator discovers serious problems, he or she must record the problems in the evaluation report even when it disagrees with previous feedback. There may be occasions when feedback was not provided during a reporting period, or a specific issue was not addressed; the lack of counseling or feedback, by itself, is not a sufficient challenge the accuracy or validity of an evaluation. Evaluators must confirm they did not provide counseling or feedback, and that this directly resulted in an unfair evaluation. You must also supply specific information about the unfair evaluation so the Board can make a reasonable judgement on the appeal.”

In summary, the applicant has not provided sufficient, substantiating documentation or evidence to prove the EPR was rendered unfairly or unjustly. Air Force policy is an evaluation report is

<sup>1</sup> AFI 36-2406, dated 4 Aug 23

<sup>2</sup> AFI 36-2406, dated 14 Nov 19

<sup>3</sup> *ibid*

<sup>4</sup> AFI 36-2406, dated 4 Aug 23

<sup>5</sup> AFI 36-2406, dated 8 Nov 16

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. The applicant failed to provide the necessary information/support from any rating official on the contested EPR. Without the benefits of these statements, they conclude the report is accurate as written, and was accomplished in direct accordance with all applicable Air Force policies and procedures. Additionally, once a report is accepted for file, only strong evidence to the contrary warrants correction or removal from an individual's records. Finally, the burden of proof is on the applicant, who has not substantiated the EPR was not rendered in good faith.

Therefore, as the applicant had not provided compelling, substantiated evidence to show the report was unjust or inaccurate as written, and the presumed legitimacy of the report, the EPR should not be removed from the applicant's record. To void this report would remove the accountability of the applicant for this reporting period.

Notwithstanding the above, they recommend a minor administrative correction by adding "with duties at JCRC" to Section I, Block 5.

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 Feb 24 for comment (Exhibit D), and the applicant replied on 19 Mar 24. In his response, the applicant contended the advisory did not address PACAF IG's recommendation to "make a determination regarding the propriety of documenting complaint's alleged sub-par performance from the 2020 reporting period on the complainant's 2021 EPR." As the burden of proof is on him, he has provided the preponderance of the evidence that clearly shows his raters did not act in good faith to amend his 2021 EPR rating when both the LOR and UIF he received for an incident that occurred during the 2020 rating period were removed from his record by the 5 AF/CC through the UCMJ Article 138 process. Further, the justification provided by his raters in Aug 22 was not available to them until after the 2021 rating period ended, and the EPR was signed, submitted, and closed out. In short, his raters failed to acknowledge his "stellar" performance during the 2021 rating period.

In support of his rebuttal, the applicant provided several documents, to include the original ROI **Work-Product** and the PACAF IG Addendum to ROI **Work-Product** which indicates the various issues with the original ROI and for which the applicant contends clearly documents that the preponderance of evidence shows that the evaluation is invalid.

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, 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 his EPR is unjust as his rating was in reprisal for protected communications with the IG

and was in violation of AFI 3-2406 as both his rater and additional rater failed to acknowledge his performance while detailed. Further, the applicant contends the advisory failed to address PACAF IG's recommendation to determine the propriety of documenting the applicant's alleged sub-par performance from previous rating period on his 2021 evaluation. Based on the authority granted pursuant to Title 10 USC § 1034, the Board reviewed the complete evidence of record to reach its own independent determination and agrees with the original ROI and PACAF's Addendum to the ROI assessment. In this regard, the Board determined a preponderance of evidence shows there is no evidence the applicant's rater or additional rater deliberately reprised against him. The Board finds that neither his rater's and additional rater's assessment of "Exceeded some, but not all expectations" were either arbitrary or capricious and fall well-within the bounds of their authority. While PACAF/IGQ noted errors and anomalies not addressed in the original ROI, the Board agrees with PACAF/IGQ and finds these error and anomalies do not affect the overall findings of the investigation. In this regard, the Board finds that applicant's alleged sub-par performance during the previous reporting period did not affect the overall rating for his 2021 evaluation. Finally, the Board notes AFPC/DP3SP's recommendation for a minor administrative correction to the evaluation by adding "with duties at JCRC" to Section I, Block 5; however, this can be resolved administratively through the applicant's Military Personnel Flight or through the ERAB. For the remainder of the applicant's request, the Board does not find the evidence sufficient to recommend removing the evaluation from his record and therefore, the Board recommends against correcting the applicant's record.

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-2023-03598 in Executive Session on 9 Jul 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 30 Oct 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DP3SP, dated 14 Feb 24.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 20 Feb 24.
- Exhibit E: Applicant's Response, w/atchs, dated 19 Mar 24.
- Exhibit F: IG ROI, dated 23 Jan 23, 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.

11/15/2024

X

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Board Operations Manager, AFBCMR

Signed by:

*Work-Product*

**AFBCMR Docket Number BC-2023-03598**

*Work-Product*