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

**RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2023-03615

Work-Product

**COUNSEL:** Work-Product

**HEARING REQUESTED:** NO

**APPLICANT’S REQUEST**

His Officer Performance Report (OPR), for the period of 1 Feb 17 – 3 Jul 17, be removed from his records.

**APPLICANT’S CONTENTIONS**

The referral OPR, for the rating period of 1 Feb 17 - 3 Jul 17, was administered in conjunction with a Letter of Reprimand (LOR) for Driving While Intoxicated (DWI). The case was eventually dismissed and expunged from all records; thus the charges did not result in a conviction. The LOR removed from his record sometime in 2019; however, the referral OPR remains. As his case was dismissed in 2020 with no conviction, the incident in question, which resulted in a referral OPR and LOR, can not be used as a basis for punishment and therefore all derogatory information should be removed from his record.

The applicant’s complete submission is at Exhibit A.

**STATEMENT OF FACTS**

The applicant is an Air Force major (O-4).

On 8 Jun 17, the applicant received a LOR from his wing commander as the result of an investigation which disclosed the applicant wrongfully drove a vehicle while intoxicated in violation of Article 111 of the Uniform Code of Military Justice. Specifically:

On 4 Apr 17, at almost midnight, the <state> Highway Patrol, after finding the applicant’s vehicle on its side in a ditch along the side of the road, approached the applicant and noticed the applicant smelled of alcohol, had red blood shot eyes, slurred speech, walked slow and with a “heavy foot.” After admitting to only drinking one rum and coke, the applicant refused to provide a breathe sample so the officer obtained a warrant for a blood draw. The officer cited the applicant for DWI under <state> law as the applicant failed two field sobriety tests; the Horizontal Gaze Nystagmus Test, and the Walk and Turn Test. After receiving the citation, the applicant’s blood sample was tested and reflected his blood alcohol content (BAC) of 0.161, more than double the legal limit of 0.08.

On 8 Jun 17, the applicant acknowledge receipt of the LOR and on 13 Jun 17 submitted a response.

On 14 Jun 17, the wing commander decided to have the LOR stand as written and included in the applicant’s Officer Selection Record (OSR).

**AFBCMR Docket Number BC-2023-03615**

Work-Product

Work-Product

On 15 Jun 17, the applicant acknowledged advisement of the final disposition of the LOR and OSR decision.

On 25 Sep 17, according to AF Form 707, *Officer Performance Report (Lt thru Col)*, for the reporting period of 1 Feb 17 – 3 Jul 17, the applicant received a referral report. Section IX, *Performance Factors*, Item 3, *Professional Qualities*, was marked as “Does Not Meet Standards.” Additionally, Section XI, *Referral Report*, reflects the following “my rating of “Does Not Meet Standards,” is in Section IX, item 3 and my comment pertaining to your arrest for driving while intoxicated is in Section IV, line 6,” Section IV, *Rater Overall Assessment*, line 6, reflects: “Drove off base while intoxicated, cited by <state> Highway Patrol, received Letter of Reprimand.”

The applicant, in an undated response, *Written Presentation to Referral Officer Performance Report*, requests the wing commander take into consideration the USAF does not have the primary right of jurisdiction in his case and the outcome of the alleged offense is still unknown as he believes upon further review and action by his civilian attorney, the charges will be dismissed and the basis for the LOR and referral OPR will be nullified.

On 9 Oct 17, the wing commander concurred with the rater’s and the additional rater’s overall assessments.

On 11 Oct 17, the applicant acknowledged receipt of the referral OPR.

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

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

Air Force Instruction (AFI) 36-2406, *Officer and Enlisted Evaluation Systems*, 8 Nov 16:

12.4.1.1. Raters must ensure that information relied upon to document performance, especially derogatory information relating to unsatisfactory behavior or misconduct is reliable and supported by 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, courts-martial conviction, etc.

#### **AIR FORCE EVALUATION**

AFPC/DP3SP recommends denying the request. The applicant has not provided documentation or compelling evidence to show the referral OPR is unjust or inaccurate as written. The applicant received an LOR for substantiated misconduct, “Drove off base while intoxicated, cited by Work-Pr... Highway Patrol.” In accordance with AFI 36-2406, paragraph 1.1.4.1.4, his rater appropriately chose to comment and document on the applicant’s OPR the underlying wrongdoing and the applicant has provided no evidence to show the comment was inaccurate or unjust and given the incident, the inclusion of the comment was appropriate and within the rater’s authority. Additionally, a final review by the applicant’s final reviewer/commander served as a final “check and balance” to ensure the report was given fair consideration in accordance with the established intent of the Officer and Enlisted Evaluation System in place. Even though his case was expunged in civil court, it was within the military’s jurisdiction to take “administrative action” and the

comment referencing his behavior on the referral OPR is fair, accurate and in accordance AFI 36-2406 guidance.

Air Force policy is that an evaluation report is considered to represent the rating chain's best judgement at the time it is rendered, and is accurate as written when it becomes a matter of record. To effectively challenge an evaluation it is necessary to hear from all the rating officials, not only for support, but also for clarification and/or explanation and the burden of proof is on the applicant. He has failed to provide any statements or support from any rating official on the referral OPR. Without these statements, it can only be concluded the OPR is accurate as written. Thus, it is determined the OPR was accomplished in direct accordance with all applicable Air Force policies and procedures and that only strong evidence to the contrary warrant removal.

Therefore, based on insufficient corroborating evidence provided by the applicant and the presumed legitimacy of the OPR, the OPR should not be removed/voided from his permanent record. To void this report would remove accountability of his conduct.

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 29 Jan 24 for comment (Exhibit D), and the applicant replied on 23 Feb 24. In his response, the applicant through counsel, respectively disagrees the removal the referral OPR from his record would result in removing his accountability for his actions. While the LOR which served as the basis for his referral OPR has been removed, he has faced the consequences and the weight of his actions as he has been passed over for promotion. Given the amount of time which has passed, the expunction action and the removal of the LOR, removing the referral OPR is only appropriate in order for him to continue serving the Air Force at higher levels of trust and responsibility.

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. While the applicant contends as his civilian record was expunged, all resulting derogatory information should be removed from his record, to include the referral Officer Performance Report, the Board disagrees. The Board determines the OPR to have met the criteria of AFI 36-2406, it is reasonably specific, and clearly outlines the event and/or behavior as the underlying conduct is specifically cited with the resulting action included. The Board finds neither of his raters or additional rater's comments were capricious or arbitrary and fell well within the bounds or their authority. Additionally, in accordance with the Congressional-mandate which requires the military to furnish adverse information to selection boards considering active duty officers for promotion to O-4 and above, the Board notes the applicant's Letter of Reprimand, which formed the basis of the referral evaluation, is present in the applicant's official military record. Lastly, the Board finds the applicant's circumstances are not unique compared to similarly situated officers. Therefore, the Board recommends against correcting the applicant's records.

**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-2023-03615 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 13 Oct 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DP3SP, undated
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 29 Jan 24.
- Exhibit E: Applicant’s Response, w/atchs, dated 23 Feb 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.

9/30/2024

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 Board Operations Manager, AFBCMR  
 Signed by: Work-Product