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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-04011

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. His AF Form 3070B, *Record of Nonjudicial Punishment Proceedings (TSgt thru CMSgt)*, dated 12 Apr 18 and the Article 15 be removed from his records.
2. He be refunded \$3,310.00 for the forfeiture of pay.

APPLICANT'S CONTENTIONS

The Board concluded in his prior case, BC-2022-02211, he was the victim of an error or injustice. The Board found he was not on station but was deployed during the time frame of the alleged misconduct.

The applicant provides a military personnel data system (MilPDS) printout, which shows the applicant was deployed from 24 Nov 17 to 23 Mar 18. He also provides a leave balance report which shows he was on leave 12 Jun 17 to 16 Jun 17.

He provides a letter of support dated 1 Jun 22 from a retired senior master sergeant (E-8), which states he was assigned to the security forces squadron (SFS), and he was the applicant's former superintendent. He worked closely with the applicant for more than two years at the time he was the kennel master. The allegations he was charged with were never substantiated and there was no evidence supporting the accusations. The allegations were only brought to light while the applicant was deployed, and the accuser claimed the acts were committed over a year prior to the reporting of the incident. The applicant was assigned to his flight at the time of the allegations. Had he and the flight chief been afforded an opportunity to weigh in, his recommendation would have been that no action be taken against the applicant.

He provides a letter of support dated 17 Jun 22 from a retired master sergeant (E-7), which states the applicant was not assigned to his flight; however, his squadron commander (SQ/CC) forced him to write the applicant a referral evaluation or face insubordination charges. The applicant was not in the country at the time of the accusations but was deployed. He also did not commit the acts. After the applicant was punished and he was reassigned, it was discovered the accuser made false statements because she was angry he had marked her down on her enlisted performance report (EPR).

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

AFBCMR Docket Number BC-2023-04011

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The applicant is a currently serving Air Force senior master sergeant (E-8).

Per the AF Form 3070B dated 12 Apr 18, the applicant received an Article 15 for wrongfully abusing a public animal between on or about 1 Jun 17 to 30 Nov 17 and violation of a lawful order to not contact any military working dog (MWD) handlers between on or about 21 Feb 18 to 26 Feb 18. The applicant's punishment included reduction to the grade of staff sergeant (E-5), suspended through 25 Oct 18, forfeiture of \$1,655.00 pay per month for two months and 15 days of extra duty. The applicant's automated records management system (ARMS) record does not include any response to the Article 15. However, a memorandum for record (MFR) signed by the applicant dated 1 May 18 acknowledging the calculation error for his appeal decision and that he waived the required five day appeal period is attached to the AF Form 3070B.

On 21 May 18, the applicant's right to bear firearms was withdrawn due to the Article 15.

On 20 Jun 18, the applicant's Air Force Specialty Codes (AFSC) 3P071 (Security Forces) and 3P051A (MWD Handler) were removed for cause and the applicant was reclassified into AFSC 3F071 (Personnel).

The applicant received a referral EPR for the period ending 25 Aug 18 for Article 15 and for abusing a public animal.

On 7 Feb 23, the Board granted the applicant's request for removal of his referral EPR for the period ending 25 Aug 18 and he be considered for supplemental promotion to the grade of E-7 (BC-2022-02211). The Board found the letters of support persuasive to find the EPR was not factually accurate, it was based on false allegations and a rushed investigation. Moreover, it appeared the applicant was not on station but deployed during the timeframe of the alleged misconduct. Accordingly, the Board concluded the applicant sustained his burden of proof for removal of the referral EPR and he be considered for supplemental promotion to the grade of E-7.

Per Special Order **Work-Product** dated 7 Aug 23, the applicant's approved retirement in the grade of technical sergeant (E-6) was rescinded.

The applicant was promoted to the grade of E-7 with date of rank (DOR) and effective date for promotion of 1 Sep 21.

MilPDS reflects the applicant is projected for promotion to the grade of senior master sergeant (E-8), awaiting the announcement of his promotion sequence number (PSN).

On 30 Jan 24, the AFBCMR Staff advised the applicant a legal review identified the applicant's response to the Article 15 was missing from his ARMS record and requested he provide a copy. In an email dated 31 Jan 24, the applicant responded his 60 page response was provided to the first sergeant and commander during the time and he believed the documents were destroyed.

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

APPLICABLE AUTHORITY/GUIDANCE

DAFI 36-2603, *Air Force Board for Correction of Military Records*, paragraph 1.1., In accordance with 10 U.S.C. § 1552, the Secretary of the Air Force (SECAF) is authorized to correct any military record of the Department of the Air Force (DAF) when the SECAF considers it necessary to correct

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an error or remove an injustice. Such corrections shall be made by the SECAF, acting through boards of civilians in the executive part of the DAF.

AIR FORCE EVALUATION

AF/JAJI recommends denial. AF/JAJI finds the AFBCMR's decision to grant the applicant relief in BC-2022-02211 was in error based upon their knowledge of how the nonjudicial punishment (NJP) process works. They are also wholly unconvinced by his letters of support. It would be essentially impossible for a commander to impose NJP without sufficient evidence to meet the burden of proof. The Board did not have the benefit of considering the evidence supporting the NJP action. Unfortunately, AF/JAJI also does not have access to that evidence in considering the request. He has only provided letters of support from individuals who were not firsthand witnesses. Without seeing the evidence supporting the NJP, they cannot in good faith recommend undoing a commander's action where there is no proof he acted arbitrarily and capriciously or abused his authority. There is no evidence of material error or injustice.

AF/JAJI requested a copy of any report of investigation (ROI) associated with the applicant's NJP. It was determined no law enforcement or commander directed investigation (CDI) ROI with the applicant as the subject exists.

The allegations forming the basis for the offenses the applicant was found guilty of through NJP proceedings were apparently brought to light while the applicant was deployed. The record indicates he was returned early from deployment as a result. The offense in violation of Article 134 concerned the applicant abusing a MWD by slinging it in the air by its leash causing it to choke and slamming it to the ground "between on or about 1 Jun 17 and 30 Nov 17." The offense in violation of Article 92, concerned the applicant violating an order on "divers' occasions" not to have contact with MWD handlers "between on or about 21 Feb 18 and on or about 26 Feb 18. A review of the applicant's NJP demonstrates all procedural requirements were complied with, he was afforded due process, and his rights were preserved. There is no procedural error contained within the NJP to warrant correction.

With regard to the applicant's leave and temporary duty (TDY) history, the documentary evidence does not prove the applicant's assertion he could not have committed the offenses because he was not on the base at the time. First, the timeframe for both offenses specify an estimated date range by stating "between on or about." This is an authorized practice when it is not clear from the evidence of the exact date an offense occurred. Second, while it appears the applicant was deployed when the allegations were brought forward, he was not deployed for the majority of the timeframe charged. His deployment started 24 Nov 17, six days before the end of the charged time frame. Concerning his leave history, he was only on leave for a total of seven days (12 to 16 Jun and 13-14 Jul 17) during the charged timeframe. There was a multitude of other days the applicant was on station and the offense could have been committed. It does not appear from his TDY history, he was deployed during the charged time frame for the order not to contact MWD handlers. There is nothing in the records lending insight into why this was the charged timeframe or what the method of contact was. However, an NJP action remains valid even if the specification fails to include all the elements of an offense, provided the member is reasonably informed of the nature of the alleged misconduct. The applicant was reasonably informed of the nature of the alleged misconduct. Not charging the exact dates or location does not render this NJP action invalid or that it is not supported by the evidence.

The letters of support provide no factual details or analysis, only blanket assertions based on what appears to be opinions and speculation. Not a single one of his supporters claim to be firsthand fact witnesses to the charged misconduct or to the claims they make in their letters. None of the

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supporters assert they had an opportunity to review the available evidence, were privy to the commander's entire decision making process or they were present during legal advisement from the staff judge advocate (SJA) to the commander. Opinions and speculation are not fact evidence.

An evaluation of how NJPs are processed cuts against the applicant's claims and those of his supporters that there was no evidence. When determining whether to offer NJP, a commander obtains legal advice from their SJA. The SJA should advise the commander how to properly allege each offense to state a violation of the UCMJ, consistent with available facts and evidence. The legal office provides the language describing each offense on the AF Form 3070. Although the ultimate decision rests with the commander, the legal office provides advice on whether NJP is an appropriate disciplinary tool for the offense at issue and whether there is sufficient evidence to meet the burden of proof. Following legal consultation and a determination by the commander to offer NJP, the legal office prepares the AF Form 3070, not the commander. Therefore, a commander could not offer NJP without the support of the legal office. Further, after a commander serves the AF Form 3070 on a member, the member and his counsel have a right to examine all statements and other evidence. The evidence is not a part of the applicant's records and was not provided in his AFBCMR application. While there is no specific standard of proof that applies to NJP proceedings, commanders should recognize that a member is entitled to demand trial by court-martial, in which case proof beyond a reasonable doubt, meaning the commander had to be firmly convinced of his guilt.

The applicant has provided no evidence, and the record discloses no information to believe his commander did not follow standard procedure for initiating and imposing NJP, to include having sufficient evidence to meet the effective burden of proof. As a result, they defer to the commander as the fact finder in this matter. After careful review, AF/JAJI finds no evidence his commander acted arbitrarily and capriciously or engaged in abuse of authority. His commander was in the best position to evaluate the information available to him to support imposing NJP. The NJP was reviewed for legal sufficiency by two separate legal offices. The legal sufficiency reviews are standard procedure for safeguards. The NJP forum was also entirely the applicant's choice. The record reflects he had the benefit of legal counsel, elected to waive his right to trial by court martial, and accepted NJP proceedings with his commander as his judge and jury. The applicant also did not exercise his right to appeal his commander's findings of guilt or punishment.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 25 Mar 24 for comment (Exhibit E), and the applicant replied on 26 Mar 24. In his response, the applicant contended there was no factual evidence, it was based on hearsay allegations from a disgruntled member. No law enforcement or CDI ROI with him as the subject exists because the case did not have any actual merit and was an abuse of command authority.

The supporters who wrote statements did so on their own free will. They were in the chain of command during the timeframe and had firsthand knowledge of the events. His accuser could never specify an actual date of the alleged incident because it never occurred. He was not in the local area, nor does he possess the physical strength or heart to harm an MWD. The operations superintendent at the time noted the commander seemed to push the investigation quicker than the five dozen Article 15s in his tenure. He further stated the allegations were hearsay and they were brought forward when he was deployed by a member who filled his role during his deployment. He asks for consideration in righting an injustice that not only hindered his career but caused harm to his mental health and his family.

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The applicant's complete response is at Exhibit F.

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 the victim of an error or injustice. While the Board notes the recommendation of AF/JAJI against correcting the record and further states the Board erred when it granted the applicant's request for removal of his referral EPR for the period ending 25 Aug 18 (BC-2022-02211), the Board finds a preponderance of the evidence substantiates the applicant's contentions. Firstly, on behalf of the SECAF and in accordance with U.S.C. § 1552 and DAFI 36-2603, it is within the Board's authority to recommend correction of a military record when finding an applicant was a victim of an error or injustice. While the Board judiciously considers the opinions and recommendations of all offices of primary responsibility (OPR), the Board is not bound to the opinions and recommendations of the OPRs. In this case, as pointed out by AF/JAJI, unfortunately, there are no law enforcement investigations or any CDI ROI. However, the presumption of regularity applies to the processing of nonjudicial punishment. Nonjudicial punishment actions are prepared for the commander by the servicing legal office which reviews the evidence before making a recommendation to the commander. As indicated in the AF/JAJI advisory opinion, applicant could have chosen to not accept nonjudicial proceedings, but he chose to accept the proceedings after consulting a lawyer. The commander found the applicant not guilty of two of the charged offenses. Such action indicates the commander acted fairly and impartially in taking action. Upon completion of the imposition of nonjudicial punishment, the legal office for the General Court-Martial Convening Authority found it to be legally sufficient. Had there not been evidence to support the nonjudicial punishment, it would not have been found legally sufficient. The Board disagrees with AF/JAJI the letters of support provided by the applicant are not persuasive. The senior noncommissioned officers who provided the letters of support were in the applicant's squadron and supervisory chain of command during the timeframe in question. One of the letters is from a retired E-7, Mr. Howard, who was assigned to applicant's squadron during the relevant time. He claims that after applicant received nonjudicial punishment and transferred to another duty assignment it was discovered that the accuser made false statements against applicant because she was angry that she was marked down on her Enlisted Performance Report. Another letter is from a retired E-8, Mr. Isaac, who was the Operations Superintendent of the 78th Security Forces Squadron at the time of the applicant's alleged misconduct. Mr. Isaac asserted the Article 134 offense was alleged by a member who "always seemed to have a personal vendetta against people in leadership that did not present them with every one of their desires." This statement challenging the accuser's credibility is consistent with Mr. Howard's statement that it was later proven that the accuser's allegation was false.

The Board notes the applicant has the burden of overcoming the presumption of regularity and finds he has sustained his burden of proof to warrant granting relief. In view of the above, and in the interest of justice, the Board recommends the Article 15 be removed from his records and he be refunded the \$3,310.00 forfeiture of pay as a result of the Article 15 punishment. Therefore, the Board recommends correcting the applicant's records as indicated below.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show:

- a. AF Form 3070B, *Record of Nonjudicial Punishment Proceedings (TSgt thru CMSgt)*, dated 12 Apr 18 be removed from his records.
- b. He be refunded the \$3,310.00 forfeiture of pay for the Article 15 punishment.

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-2023-04011 in Executive Session on 11 Jun 24:

[REDACTED], Panel Chair
[REDACTED], Panel Member
[REDACTED], Panel Member

All members voted to correct the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 4 Dec 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: AFBCMR ROP (BC-2022-02211), dated 19 Mar 23.
- Exhibit D: Advisory Opinion, AF/JAJI, dated 19 Mar 23.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 25 Mar 24.
- Exhibit F: Applicant's Response, dated 26 Mar 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.

5/8/2025

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Board Operations Manager, AFBCMR
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