



CUI// [REDACTED] Work-Product

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

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-00189

[REDACTED] Work-Product

COUNSEL: [REDACTED] Work-Product

HEARING REQUESTED: NO

### APPLICANT'S REQUEST

Her Letter of Counseling (LOC), issued 9 Feb 20, be expunged from her Officer Selection Record (OSR) and Master Personnel Record Group (MPerRGp).

### APPLICANT'S CONTENTIONS

The current [REDACTED] Work-P... Rescue Wing Commander (RQW/CC) reviewed her LOC and determined the following:

(1) Case was not in compliance with TAG policy 2019-03, *Withholding and Delegation of Jurisdiction for Misconduct Cases Involving Cos WOs and SNCOs E-7 and above*, dated 9 Apr 19, as no delegation of authority was obtained by the commander at any time in accordance with the policy.

(2) Applicant was not advised she was the subject of a Commander Directed Investigation (CDI) until showing up for questioning and at that time was not afforded counsel. As stated in Tab C of the investigation: "member is not authorized legal representation."

(3) No witnesses could dispute or confirm allegations of the specific incident, and the preponderance of the statements made in the investigation referenced times when the applicant was on Title 5 as a medical provider at the wing.

As a result of the RQW/CC's review, and in accordance with AFI 36-2907, *Adverse Administrative Actions*, paragraph 2.4.6, the RQW/CC rescinded the LOC effective 11 Dec 23. Furthermore, the LOC is not visible to her or the Force Support Squadron (FSS) in the Personnel Records Display Application and is only seen in her Automated Records Management System (ARMS) record. Lastly, an Unfavorable Information File (UIF) was never established.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is an Air National Guard lieutenant colonel (O-5).

On 19 Nov 19, according to *Commander Directed Investigation, Allegations Concerning Unprofessional Behaviors & Specific Incidents on 12 & 15 Jan 19*, the [REDACTED] Work-P... RQW/CC in coordination with the [REDACTED] Work-Pr... Medical Group Commander (MDG/CC), appointed an Investigating Officer (IO) to conduct a CDI concerning an allegation the applicant repeatedly displayed a history of unprofessional behaviors that caused an unprofessional work environment in violation of AFPD-1, *Air Force Culture*, paragraph 1.1.1, including a specific incident on or about 12 Jan 19.

**AFBCMR Docket Number BC-2024-00189**

CUI// [REDACTED] Work-Product

Controlled by: SAF/MRB

CUI Categories: [REDACTED] Work-Product

Limited Dissemination Control: N/A

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

The CDI was conducted from 19 Nov 19 – 31 Dec 19. As a result of the investigation, the IO found the allegation to be **Substantiated**, concluding:

“The preponderance of evidence shows that during this investigation, that while no other personnel were present to confirm or refute the specific incident alleged on 12 Jan 19, a majority of witnesses demonstrated other specific instances over the course of time working with <applicant> of unprofessional behaviors on the part of <applicant>. The evidence and my assessment of the testimony also provides me enough basis to conclude that the specific incident on 12 Jan 19 also represented an example of unprofessional behavior.”

On 12 Jan 20, RQW/JA reviewed the findings of the CDI and found it to be legally sufficient and recommended the RQW/CC approve the CDI findings as written.

On 9 Feb 20, as the result of the CDI according to a memorandum, *Letter of Counseling*, the applicant received a LOC from the MDG/CC for repeated behavior in a manner that caused an unprofessional work environment in violation of AFD -1, paragraph 1.1.1, including a specific incident on or about 12 Jan 19 in which she yelled in the face of a subordinate enlisted member and then physically prevented them from leaving the room. Further, she was advised she had 45 calendar days from receipt to provide a response. On the same date, the applicant acknowledged receipt and on 13 Sep 20 she submitted a response.

On 5 Oct 20, the applicant acknowledged on that date the MDG/CC advised her they had considered all the matters submitted by her in response to the LOC and had determined she engaged in the conduct and decided to sustain the LOC. Further, the MDG/CC advised they will proceed with establishing an Unfavorable Information File (UIF).

On 7 Jan 24, according to memorandum, *Legal Review of CDI Finding and LOC Recension*, the RQW/JA reviewed the decision and bases to rescind a substantiated finding of a CDI and subsequent LOC and find the decision to be legally sufficient.

On 19 Jan 24, according to memorandum, *Legal Sufficiency Review – [applicant] Federal Recognition Board Package*, the **Work-Product** Air National Guard State Staff Judge Advocate – Air (Wor...ANG/SSJA), conducted a review of the applicant’s adverse information found in the applicant’s promotion record. The memorandum indicates the RQW/CC rescinded the LOC on 21 Dec 23; however, noted the typical mechanism to correct military records is the AFBCMR. As such, the **Wor...**ANG/SSJA found the adverse information in the promotion package to be legally sufficient and indicated it should remain in the applicant’s promotion record.

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 Policy Directive 1 (AFPD-1), Air Force Culture*, 16 Oct 19, paragraph 1.1.1. It is every Airman’s duty and obligation to act professionally and meet all Air Force standards at all times.

*The Secretary of the Air Force Office of Inspector General Complaints Resolution Directorate (SAF/IGQ), Commander Directed Investigation (CDI) Guide*, 18 Feb 16:

1.4. Standard of Proof. The standard of proof for a CDI is **preponderance of the evidence**. A preponderance of the evidence is defined as “the greater weight and quality of the credible evidence,” meaning the evidence indicates one position is more probable than the opposing position.

2.1. Matters Appropriate for a CDI. Generally speaking, commanders may initiate an investigation into matters within their command when another investigative channel does not exist or is less suitable. For example, investigations into matters that will likely result in a court-martial or other judicial action would normally be referred to the Air Force Office of Special Investigations or Security Forces. Commanders should consult with the SJA regarding whether or not a CDI is the best means of investigating a matter. Command matters include all issues and circumstances involving people, processes and materials under their command.

2.1.1. Standards of Conduct. CDIs may be used to investigate whether an individual has violated a standard defined by law, regulation, or policy.

5.2.1.5.1. Military. The mere fact that someone is the subject of a CDI does not automatically trigger the need for a rights advisement. The test is whether the IO, at the time the active duty military subject is interviewed, either believes or reasonably should believe the individual has committed an offense under the UCMJ or other criminal code. If so, then the subject or witness should be considered a *suspect*. The IO should advise suspects of their Article 31(b), UCMJ rights. Cases involving Guard and Reserve personnel are further complicated by their status at the time of the alleged conduct and the time of interview. Consult with the legal advisor in these cases prior to interviewing a subject or suspect.

5.2.1.6.2. Attorneys. Only a *suspect* has the right to have an attorney present during an interview. The attorney may not answer questions for the suspect. Witnesses and *subjects* may consult with their attorney, but are not normally permitted to have an attorney present during the interview.

**Department of the Air Force Instruction (DAFI) 36-2907, *Adverse Administrative Actions*, 14 Oct 22:**

1.2. Adverse Information for Total Force Officer Selection Boards Overview. All adverse information an officer receives will be filed in the OSR and will be considered by promotion selection, special selection, Federal recognition (ANG specific), and selective continuation boards to the grade of O-4 and above (to include processes for O-3 promotions that have “extraordinary adverse information” per Department of Defense Instruction (DoDI) 1320.14, *DoD Commissioned Officer Promotion Program Procedures*).

1.2.1. Adverse information is any substantiated finding or conclusion from an officially documented investigation or inquiry or any other credible information of an adverse nature. To be credible, the information must be resolved and supported by a preponderance of the evidence. **(T-0)** To be adverse, the information must be derogatory, unfavorable, or of a nature that reflects clearly unacceptable conduct, integrity, or judgment on the part of the individual. **(T-0)** Adverse information includes, but is not limited to:

1.2.1.1. Any substantiated adverse finding(s) or conclusion(s) from an officially documented investigation or inquiry, regardless of whether command action was taken as a result.

1.2.1.7. LOC related to a substantiated finding or conclusion from an officially documented investigation or inquiry.

1.2.7. Additional Information Pertinent to Officially Documented Investigations or Inquiries. In the event an officially documented investigation or inquiry concludes with a substantiated finding and a commander (or equivalent) decides not to issue written command action (e.g., Record of Individual Counseling (RIC), LOC, LOA, LOR, and Non-Judicial Punishment), to include verbal counseling, the findings and the commander’s decision must still be documented and filed in the

MPerRGp and OSR via a MFR (sample provided at Attachment 6) and Adverse Information Summary (AIS).

2.4.6.3.3. Rescinding a RIC, LOC, LOA, or LOR removes the rescinded action from the UIF or PIF. However, it does not automatically remove it from historical documents or actions collaterally impacted by the rescinded document, such as a referral Officer or Enlisted Performance Report or promotion withhold. Airmen and Guardians seeking relief from the collateral consequences of a later-rescinded administrative action must apply to the appropriate forum, to include, for example, the AFBCMR. (T-1)

2.4.6.3.2. For officers, the member's current unit commander or individuals listed in paragraph 2.1 and paragraph 4.4.1 through paragraph 4.4.6 in the current chain of command and equal or senior in grade to the initial imposing authority **may only rescind RICs and standalone LOCs** (see paragraph 1.2.2) **contained in the officer's PIF**.

## AIR FORCE EVALUATION

Work...ANG/SJA, recommends granting the request. Based on the legal review of the CDI and the proposed LOC rescission by the RQW/CC, Work...ANG/SJA concurs with the legal review of the RQW/JA in that the RQW/CC has the authority to rescind the LOC and there is a reasonable basis to do so. The RQW/JA legal review correctly notes three grounds for rescission: a lack of a documented delegation of authority per TAG Policy 2019-03; a lack of due process required under DAFMAN 1-101, *Air Force Culture* (Note: DAFMAN 1-101 was not in effect at the time of the LOC); and finally, the limited evidence in the CDI to support the allegation.

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 22 Apr 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 reviewing all Exhibits, the Board concludes the applicant is the victim of an error or injustice. The Board concurs with the rationale and recommendation of Work...ANG/SJA and finds a preponderance of the evidence substantiates the applicant's contentions. Specifically, the Board concurs with the applicant's wing commander's rationale and decision to rescind the Letter of Counseling as its unclear the issuance of the adverse action was in compliance with the TAG Policy in effect at the time. Therefore, the Board recommends correcting the applicant's record as indicated below.

## RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show the Letter of Counseling, issued 9 Feb 20, be declared void and removed from her Officer Selection Record (OSR) and Master Personnel Record Group (MPerRGp).

## 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-2024-00189 in Executive Session on 12 Nov 24:

[REDACTED] Work-Product Panel Chair

[REDACTED] Work-Product Panel Member

[REDACTED] Work-Product Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 9 Jan 24.

Exhibit B: Documentary evidence, including relevant excerpts from official records.

Exhibit C: Advisory opinion, [REDACTED] Work-Product ANG/SJA, dated 11 Apr 24.

Exhibit D: Notification of advisory, SAF/MRBC to applicant, dated 22 Apr 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.

2/10/2025

X [REDACTED] Work-Product

[REDACTED] Work-Product

Board Operations Manager, AFBCMR

Signed by: [REDACTED] Work-Product