



Work-Product

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

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-00612

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

### APPLICANT'S REQUEST

1. The Letter of Reprimand (LOR) dated 21 October 2023, be removed from her records and she be considered by a Special Selection Board for the Calendar Year 2024A (CY24A) Major LAF-J Central Selection Board (CSB).
2. Any and all reference to her non-selection to major be removed from her records.

### APPLICANT'S CONTENTIONS

In a 16-page legal brief, the applicant through counsel states she is an active-duty Judge Advocate General (JAG) currently serving as a Special Victims' Counsel. In October 2023, she received a Letter of Reprimand (LOR) alleging she violated Article 134 of the Uniform Code of Military Justice (UCMJ) for marrying an enlisted member. However, the LOR is legally erroneous because it fails to make even a minimal showing the applicant's conduct satisfied two elements required to sustain the offense: 1) her conduct was to the prejudice of good order and discipline in the Armed Forces and 2) was of a nature to bring discredit upon the Armed Forces. Further, considering the totality of the circumstances, the LOR rises to a correctable injustice because it stands to disproportionately punish the applicant by prejudicing her promotability. At the core of this matter is the applicant's desire to be a parent. For years, she had unsuccessfully attempted to conceive a child of her own (as a single woman) at great financial and emotional expense. She reluctantly ended her pursuit after a viable conception resulted in a defeating miscarriage. She also made attempts to adopt a child but her efforts to adopt were proven unsuccessful. She also took the necessary steps to become a licensed foster care provider. Between 2018 and 2023, she fostered 11 children about whom she states, "have been my world and I have done everything I could to keep them safe." Tragically, in 2022, one of her foster children (E.J.) passed away after the child had left the applicant's care. In June 2022, after E.J.'s passing, the applicant fostered a daughter (S.S.). She became very protective of S.S. Tragedy struck the applicant again - her sister (their mother's sole provider) committed suicide. This confluence of events, in conjunction with the persistent secondary trauma stressors from her duties as Chief, Military Justice (CMJ), formed the basis for her later diagnosis of Post-Traumatic Stress Disorder (PTSD).

In the Spring of 2023, the Air Force informed the applicant she would be moving to Work-Product AFB, Work-Product in July 2023. In April 2023, the foster care caseworker advised the applicant she would lose her license and any ability to care for S.S. if she moved out of state. She searched for someone she trusted to foster S.S. In May 2023, she met Master Sergeant G at a social event and became aware he was going through the steps to become a foster parent. The two did not have a previous relationship. The applicant asked Master Sergeant G, if he would volunteer to be S.S.'s foster parent and he agreed. However, if the two were married, Master Sergeant G would gain priority to foster the child.

AFBCMR Docket Number BC-2024-00612

Work-Product

Work-Product

On 10 July 2023, they married to guarantee Master Sergeant G's ability to foster S.S., having had no prior romantic relationship and never living together to this date. On or about 7 September 2023, Master Sergeant G requested join spouse orders at which point his command became aware of his marriage to the applicant.

The LOR is legally insufficient and should be withdrawn. The LOR is based on an erroneous definition for fraternization under UCMJ Article 134. The LOR failed to satisfy its burden to show the applicant committed fraternization by a preponderance of the evidence. The LOR is unjust considering the totality of the circumstances. It is requested the Board consider the broader equities of this case in assessing whether it rises to a correctable injustice. The applicant has a stellar performance record as evidenced by her officer performance reports. Assuming *arguendo* the LOR was legally sound, the matter indisputably was borne out of the applicant's sense of compassion and moral responsibility impelled her to take unconventional steps to protect an infant foster child. This same strength of character gives her the ability to fill a particularly intense position representing victims of domestic abuse and sexual assault. Yet, if the LOR remains in her record, it may adversely impact her ability to promote and, ultimately, to remain in the Air Force.

The applicant's complete submission is at Exhibit A.

## STATEMENT OF FACTS

The applicant is a currently serving Air Force captain (O-3).

According to Special Order **Work-Product**, dated 8 January 2020, the applicant was promoted to the permanent grade of captain with a date of rank (DOR) and effective date of 11 December 2019.

On 21 October 2023, the applicant's issuing authority administered an LOR for fraternization and marrying an enlisted member of the United States Air Force. The applicant acknowledged receipt and understanding on 23 October 2023 at which time she was advised she had three duty days from the date of the LOR to provide a response. On 5 November 2023, the applicant provided a six-page written response. On 20 November 2023, the issuing authority advised the applicant the response was considered; however, the issuing authority elected to sustain the LOR, and the LOR was placed in an Unfavorable Information File (UIF); the applicant acknowledged receipt of the final decision regarding disposition of the LOR on 21 November 2023.

According to a Staff Judge Advocate Determination – Ten Year Retention Rule Exception, dated 20 December 2023, it was determined the adverse information does involve a single act of which, if tried by court-martial, could have resulted in the imposition of a punitive discharge and confinement for more than one year. Accordingly, the exception to the retention rule is met and the adverse information should be retained in the Officer Selection Record (OSR) beyond 10 years.

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

## AIR FORCE EVALUATION

AFPC/DPMSSM recommends denial of the applicant's request to remove her LOR. Based on the documentation provided by the applicant and analysis of the facts, there is insufficient evidence of an error or injustice as it pertains to the administration of the LOR and UIF. The commander administered the LOR in accordance with DAFI 36-2907, *Administrative Adverse Actions*, chapter 3; there is no evidence of procedural deviations that would preclude filing in the applicant's record.

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 16 April 2024 for comment (Exhibit D), and counsel for the applicant replied on 29 April 2024. In his response, he indicates the AFPC/DPMSSM advisory opinion's primary deficiency is by its own terms, it limits its analysis to the issue of the "administration" of the LOR. Any advisory opinion the AFBCMR solicits must address all "crux issues." DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 4.2.2.2 (October 4, 18, 2017). The applicant's application asserts substantive challenges to the legal and factual sufficiency of the LOR. Whether her commander had authority to issue an LOR and whether the LOR was filed in the applicant's record are not contested issues and not relevant to the arguments and crux issues central to the case. Thus, not only does the AFPC/DPMSSM advisory opinion lack substantive utility, but it also contravenes the controlling AFI.

The AFPC/DPMSSM advisory opinion's myopic focus on "administration" matters is doubly problematic because if the AFBCMR concurs with and adopts its rationale, the Board will violate its decision-making obligations under federal law. Although the AFBCMR is free to seek and adopt the rationale of an advisory opinion, it still must satisfy its legal obligation to engage in lawful decision-making under the Administrative Procedure Act (APA). See *McDonough v. Stackley*, 245 F. Supp. 3d 1, 2, 5 (D.D.C. 2017) ("Trouble arises, however, when a board hinges its decision in whole on an advisory opinion does not satisfy the arbitrary and capricious standard."). The AFBCMR has a legal obligation to address all non-frivolous arguments, *Poole v. Harvey*, 571 F. Supp. 2d 120, 126 (D.D.C. 2008) and to consider all important aspects of a problem, *Gilbert v. Wilson*, 292 F. Supp. 3d 426, 434 (D.D.C. 2018). Importantly, as a regulatory matter, any advisory opinion the AFBCMR may seek must address all "crux issues [sic]." DAFI 36-2603, paragraph 4.2.2.2. The AFPC/DPMSSM advisory opinion runs afoul of all fundamental decision-making obligations and the AFBCMR should reject its analysis and fully and fairly consider the arguments and issue raised in the AFBCMR Memorandum.

In a letter from counsel dated 26 August 2024, counsel states on 21 August 2024, the applicant was informed of her non-selection for promotion to major by the CY24A Major LAF-J CSB. Her record is impeccable, except for the LOR in her file. The LOR has undoubtedly caused her non-selection for promotion. It is requested in addition to removing the LOR, any and all references to her promotion non-selection be removed from her records.

The applicant's complete response is at Exhibit E.

## **ADDITIONAL AIR FORCE EVALUATION**

AFPC/JA recommends granting the applicant's request to remove the LOR. The LOR at issue was given to the applicant by her section commander. It states, "Investigation had disclosed on or about 10 July 2023, the applicant married a master sergeant, an enlisted member of the United States Air Force working on the same base. Her actions are in violation of the UMCJ, Article 134, Fraternization. There is a long-standing and well-recognized custom of the service which officers and enlisted personnel shall not fraternize or associate with each other under circumstances which prejudice good order and discipline or are service discrediting. Marrying an enlisted member is to the prejudice of good order and discipline and service discrediting, especially while both members work on the same base."

The applicant through counsel challenges the LOR as legally deficient "because it does not demonstrate by a preponderance of the evidence the applicant's conduct met the

requisite elements of fraternization under UCMJ Article 134. The LOR was not supported by a preponderance of evidence showing the applicant's conduct prejudiced good order and discipline and otherwise was discrediting." In support of his argument, counsel details the circumstances leading up to the LOR. Namely, the applicant had a strong desire to be a parent. After several years of unsuccessful attempts to conceive, she became a licensed foster care provider. The final child she fostered entered her home in June 2022. The applicant became remarkably close to the child, considering her as her daughter. In Spring 2023, the applicant learned she was to have a permanent change of station (PCS) to another state in July 2023. The applicant would be unable to continue to foster the child if she moved out of state. Consequently, she searched for someone she trusted to foster the child in her absence. Having previously met Master Sergeant G, who she knew was seeking to become a foster parent. She asked and he agreed to foster the child; however, the foster agency indicated there was no guarantee the child would be placed with him. The only way to guarantee it would be for the applicant to marry him. On 10 July 2023, after the applicant had PCS'd, she married Master Sergeant G. The applicant indicated the two had no prior relationship and never lived together, even after marriage. It was only in early September 2023, when Master Sergeant G requested joint spouse orders, that anyone within their chain of command became aware of the marriage.

By regulation, Air Force commanders and supervisors are charged with the responsibility to administratively censure inappropriate or improper behavior in appropriate circumstances. As stated in DAFI 36-2907, "Adverse administrative actions are intended to improve, correct, and instruct subordinates who violate established Department of the Air Force (DAF) standards whether on or off duty." LORs are discretionary in nature, must be supported by a preponderance of the evidence, and will not be disturbed unless the evidence is not sufficient and/or the action constituted an abuse of discretion.

The elements of Fraternization are as follows:

1. The accused was a commissioned or warrant officer.
2. The accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner.
3. The accused then knew the person(s) to be (an) enlisted member(s).
4. Such fraternization violated the custom of the accused's service which officers shall not fraternize with enlisted members on terms of military equality; and
5. Under the circumstances, the conduct of the accused was either:
  - (i) to the prejudice of good order and discipline in the Armed Forces.
  - (ii) was of a nature to bring discredit upon the armed forces; or
  - (iii) to the prejudice of good order and discipline in the Armed Forces and of a nature to bring discredit upon the Armed Forces.

The UCMJ explains "whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The facts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude the good order and discipline of the Armed Forces has been prejudiced by their tendency to

compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.”

AFI 36-2909, *Air Force Professional Relationships and Conduct*, essentially mimics the UCMJ factors to be considered. Paragraph 3.2.3.1. states, “Officer-enlisted marriages entered into while the spouses were in officer or enlisted status, respectively, may constitute fraternization if the marriage has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale.”

In this case, the first four elements of fraternization have been met; however, the evidence is not sufficient to support the final element which the conduct was prejudicial to good order and discipline or service discrediting. Although the LOR indicates marriage in and of itself meets this element, neither the UCMJ nor any Air Force regulation classifies simple marriage between an officer and enlisted member as fraternization. As noted above, it depends on the circumstances. While not dispositive, it is certainly compelling the applicant’s conduct did not implicate any of the factors set forth for consideration by the UCMJ/AFI. Namely, it did not compromise the chain of command (the applicant and Master Sergeant G, were not in the same chain of command nor were their chains even aware of the marriage until months after it occurred); it did not result in the appearance of partiality (applicant had no professional interactions with the master sergeant); and there is no evidence it otherwise undermined good order, discipline, authority, or morale. Unlike a traditional relationship, involving dating, romance, and sexual relations, the available evidence indicates the relationship between the two was merely contractual, a matter of convenience, entered into solely for the sake of the applicant’s foster child. They never lived together, nobody knew of the relationship until several months after they were married, and by then, the applicant lived in a completely different state. In fact, the marriage occurred after the applicant had moved, contrary to the LOR’s statement they married while working on the same base. Overall, while certainly unusual, such conduct is neither prejudicial to good order and discipline nor service discrediting. Consequently, the LOR is legally unsupportable.

The complete advisory opinion is at Exhibit F.

## **APPLICANT’S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the additional advisory opinion to the applicant on 18 October 2024 for comment (Exhibit G), and counsel for the applicant replied on 19 October 2024. Counsel indicates the applicant concurs with the AFPC/JA advisory opinion. The LOR is legally deficient because the evidence does not support the applicant’s actions met a terminal element of fraternization - which the conduct was prejudicial to good order and discipline or service discrediting. As the advisory correctly notes, the applicant has requested removal of the contested LOR as well as consideration by an SSB for the CY24A Major LAF-J Central Selection Board which recently passed her over. We respectfully request as part of this relief, the AFBCMR remove all indicia of the applicant’s non-selection for the CY24A Major LAF-J Central Selection Board to ensure fair SSB consideration.

The applicant’s complete response is at Exhibit H.

## **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 AFPC/DPMSSM against correcting the record, the Board concurs with the rationale and recommendation of AFPC/JA and finds a preponderance of the evidence substantiates the applicant's contentions. The Board notes four elements of fraternization under UCMJ Article 134, were met; however, the fifth element; the conduct of the accused was either to the prejudice of good order and discipline in the Armed Forces; was of a nature to bring discredit upon the Armed Forces; or to the prejudice of good order and discipline in the Armed Forces and of a nature to bring discredit upon the Armed Forces is not supported by a preponderance of the evidence. Specifically, the applicant and Master Sergeant G, were not in the same chain of command, nor were their chains aware of the marriage until several months after it occurred; in addition, it did not result in the appearance of partiality; and there was no evidence it undermined good order, discipline, authority or morale. Further, the Board notes there is no evidence of a prior romantic relationship, and the two have never lived together to this date. Therefore, based on the available evidence of record, it appears the relationship between the two was merely contractual, a matter of convenience, entered solely for the sake of the applicant's foster child. While certainly rare, such conduct is neither prejudicial to good order and discipline nor service discrediting. As a result, the LOR is officially unjustifiable. Therefore, the Board recommends correcting the applicant's records as indicated below.

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

- a. The Letter of Reprimand (LOR) dated 21 October 2023, be removed from her records.
- b. Any and all reference to her non-selection to major be removed from her records.
- c. It is further directed that she be considered for promotion to the grade of major by a Special Selection Board for the Calendar Year 2024A (CY24A) Major Central Selection Board.

## 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-2024-00612 in Executive Session on 10 December 2024:

Work-Product Panel Chair  
Work-Product Panel Member  
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 8 February 2024.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory opinion, AFPC/DPMSSM, dated 12 April 2024.
- Exhibit D: Notification of advisory, SAF/MRBC to applicant, dated 16 April 2024.
- Exhibit E: Counsel's response, dated 29 April 2024.
- Exhibit F: Advisory opinion, AFPC/JA, dated 8 October 2024.
- Exhibit G: Notification of advisory, SAF/MRBC to applicant, dated 18 October 2024

**AFBCMR Docket Number BC-2024-00612**

*Work-Product*

Exhibit H: Counsel's response, dated 19 October 2024.

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.

3/19/2025

*Work-Product*

**AFBCMR Docket Number BC-2024-00612**

*Work-Product*