

Work-Product



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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-01599

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: NO

APPLICANT'S REQUEST

Review and correction of a wrongful non-judicial punishment (NJP) determination along with the subsequent actions:

- a. Removal of the NJP (Article 15) from his official military records.
- b. Removal of the Unfavorable Information File (UIF) from his official military records.
- c. Removal of the referral Officer Performance Report (OPR) from his official military records.
- d. Repayment of the forfeited pay and allowances, with adjustment for inflation, pay raises, and/or lost interest.
- e. Restoration of his grade of lieutenant colonel in retirement.
- f. He be considered for promotion by a special selection board (SSB) for promotion to the grade of colonel (O-6).
- g. He be awarded the Meritorious Service Medal for the affected service periods.
- h. Grant other relief the Board deems just and proper due to the wrongful NJP findings.

APPLICANT'S CONTENTIONS

Heavy political pressure from military and congressional leadership has established precedent in causing wrongful convictions/guilty findings in Article 120 rooted when RADM L admitted political pressure kept him from overturning the wrongful conviction of a Navy SEAL. The Work-Product Air Force Commander (Work-Product/CC) demonstrated his unwillingness to take career risk by throwing out the case. He did this despite heavy evidence of falsification and witness tampering by the complaining witnesses. The fact that the Defense Counterintelligence and Security Agency (DCSA) reversed their initial decision to revoke his Top Secret/Specialized Compartmental Information (TS/SCI) security clearance revocation decision after objectively reviewing the same evidence - effectively non-concurring with Work-Product/CC's findings - casts a heavy shadow on the "guilty" determination.

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His due process rights were violated by [Work-Pr...]/CC on multiple fronts; by denying his in-person appearance, as prescribed in the NJP procedures, did not provide all the evidence used when he made his determination, included out-of-investigation questioning with no governing regulation guidance supporting this action, and attempted to delegate the decision in his case to a much lower ranking subordinate who would be retired before any fallout due to the tossing of the case could occur.

[Work-Pr...]/CC made a “guilty” Article 15 determination, while staring at evidence before him that is completely contradictory to that action, to protect his chances of promotion as he knew historically what happens to other 3-star generals who do not find some sort of guilt against the men accused in cases rooted in Article 120 charges. That is, [Work-Pr...]/CC knew the Senate Armed Services Committee leadership will not defend his decision to dismiss a case under press or public scrutiny, nor will it disclose the evidence proving they made the right call. He also knew the same leadership would revoke his promotion and surreptitiously end his career by refusing to sign off on his 4th star [promotion] confirmation indefinitely, regardless of how well-supported his dismissive decision would have been. The best the [Work-Pr...]/CC was willing to do was offload the decision to an expendable subordinate, who would be retired before the fallout from the dismissed case would occur, using a bizarre, ad hoc, out-of-regulation process, in order to avoid the consequences of being the one to dismiss it himself. Under immense pressure, the [Work-Pr...]/CC ultimately chose self-interest and self-preservation over doing the right thing. Of critical note, the [Work-Pr...]/CC’s “guilty” determination collaterally resulted in a determination by the DCSA to revoke his security clearance. However, upon submitting a written response to the matters stated in DCSA’s determination memorandum, along with the evidence demonstrating the case was a fraud, that the [Work-Pr...]/CC did not offer him fair due process, and the forensic proof that the decision was rooted in career concerns, DCSA reversed their initial determination. The fact that DCSA continued his access to the nation’s most closely guarded information, in the face of the same evidence the [Work-Pr...]/CC used to assign guilt, paints a grim tale of coerced decision-making and disciplinary malfeasance.

For instance, federal law and annual training establishes that it is illegal to use CUI markings to hide evidence of criminal activity, or to conceal information embarrassing to the government. If the Board chose to uphold the [W...]/AF/CC’s determination in this case, it could result in a whistleblower coming forward, as in the case of the Navy SEAL. It is a given that the accuser admitted to committing sexual assault while under the influence of alcohol, and the evidence of undue command influence is present at numerous levels. With that knowledge, the whistleblower could release unredacted, and very incriminating evidence of those very things. The whistleblower could also release a heavily redacted copy of the exact same case, produced through a Freedom of Information Act inquiry, for comparison showing exactly what was hidden from the public. How would an ensuing, and very public investigation for everyone – from the President, through the Senate Armed Services Committee, the Secretary of the Air Force, and all the way down the chain to the members of this board – if that were to happen? Given the 2024 election season would serve as a potent referendum on the decisions and outcomes in the case, at all levels along the way, this board’s decision could prove politically critical as its safe to assume that a slew of similar cases would surface and also be investigated in the wake of such a release. Moreover, that other wrongfully punished members would be emboldened to publicly release their own, unredacted case evidence, if there was public outcry over just one similar injustice. All involved decisionmakers would assuredly know that, even if they, in the slightest way, went after the whistleblower for releasing the evidence of malfeasance/undue command influence/misappropriation of punishment/other illegal and unethical activity, the damage to their careers would already be done. Reprisal against the whistleblower and the other case holders would

appear to the voters as nothing more than concrete proof of a collective concealment effort. That appearance would be exacerbated by the fact the targeted member in the original case was the actual victim of a sexual assault, whose victimization was concealed by the service and leadership, who then punished him, to boot. They would also have to assume that if they delayed a corrective decision beyond a certain point, the whistleblower would assume the worst and ensure that all the relevant information at hand would be before voters with plenty of time before the coming elections.

To wit, if the board members felt completely comfortable standing behind [REDACTED] AF/CC's decision in the face of a very public investigation, it would make perfect sense to maintain the status quo and uphold his decision. Conversely, if they felt that any association with that same decision would be politically disastrous for all parties involved, then it would make sense to take immediate corrective action: overturn the decision, remove any/all derogatory actions against the member (e.g. UIF), restore all lost pay and benefits (adjusted for inflation and lost investment interest), strongly consider all restorative options in light of lost promotion opportunities for the affected member, and award service medals for which the member was rendered ineligible during their affected tenure, among other things.

Again, all of this is completely notional, but valuable as a guide to considering what could prove, purely in theory, to be a very pivotal decision for this board. While it will never undo all the damage already done, reversing [REDACTED] AF/CC's finding would show some degree of integrity, sanity and legally defensible decision-making, all of which have been notably absent in the administrative actions up to this point. This could establish a modicum of faith in the military justice system, thwart perceptions of covert and coercive command influence, diminish the squandering of public resources on falsified cases (and funneling said resources away from plausible victims), prevent unjust punishment assigned through politically scripted outcomes, alleviate the concealment of a serious false reporting problem within all services, and the impression that appeals for these cases are nothing but a due process facade that serve only to affirm fear-driven precedent.

No matter the outcome of his petition, his parting gift to the service will be a maximum effort to see its first core value, "Integrity First", exist as it is written. Despite his high level of cynicism towards the military justice and administrative systems, he is putting his trust in the Board to do the right thing.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 5 Jan 21, according to DD Form 458, *Charge Sheet*, the applicant was charged with four (4) violations of the UCMJ, Article 120 for:

- [he] did, at or near [REDACTED] Air Base, Japan, on or about 27 Jun 20, touch the breast of First Lieutenant (1Lt) NS, with his hand, with intent to arouse his sexual desire, without her consent.

- [he] did, at or near [REDACTED] Air Base, Japan, on or about 28 Jun 20, commit a sexual act upon [REDACTED], by penetrating her mouth with his penis, without her consent.

- [he] did, at or near [Work-Product] Air Base, Japan, on or about 28 Jun 20, commit a sexual action upon [Work-Prod...], by causing contact between his mouth and her vulva, without her consent.

- [he] did, at or near [Work-Product] Air Base, Japan, on or about 28 Jun 20, commit a sexual act upon [Work-Prod...], by penetrating her vulva with his penis, without her consent.

On 18 May 21, according to AF Form 3070C, *Record of Nonjudicial Punishment Proceedings (Officer)*, the applicant was issued NJP under Article 15, UCMJ for:

- Violation of UCMJ, Article 92; did, at or near [Work-Product] Air Base, Japan, between [W:] Jun 20 and on or about 6 Jul 20, fail to obey a lawful general regulation, to wit: Air Force Instruction, 36-2710, *Implementing Air Force Policy Directive 36-27*, by wrongfully harassing [Work-Prod...].

- Violation of UCMJ, Article 133; did, at or near [Work-Product] Air Base, Japan, between on or about 19 Jun 20 and on or about 29 Jun 20, kiss [Work-Product] without her consent, and that, under the circumstances, your conduct was unbecoming an officer and gentleman.

- Violation of UCMJ, Article 133; did, at or near [Work-Product] Air Base, Japan, on diverse occasions between on or about [W:] Jun 20 and on or about 6 Jul 20, suggest to members junior in rank that you were engaged in extramarital relationships, to wit: stating to [Work-Product] you had sexual relationships with younger women who were not your wife, or words to that effect, and that, under the circumstances, your conduct was unbecoming an officer and gentleman.

- Violation of UCMJ, Article 133; did, at or near [Work-Product] Air Base, Japan, on diverse occasions between on or about [W:] Jun 20 and on or about 6 Jul 20, suggest to members junior in rank that you were engaged in extramarital relationships, to wit: stating to [Work-Product] that you “could be in trouble for a few different things, but trouble sometimes is a lot of fun,” and that “young and fun can get you into trouble, especially when you find out that you’ve been having fun with someone enlisted,” or words to that effect, and that, under the circumstances, your conduct was unbecoming an officer and a gentleman.

- Violation of UCMJ, Article 134; [he] a married man, did, at or near [Work-Product] Air Base, Japan, on or about 28 Jun 20, wrongfully engaged in extramarital sexual conduct, to wit: oral to genital sexual intercourse and genital to genital sexual intercourse with [Work-Product], a person you knew was not your spouse, and that such conduct was to the prejudice of good order and discipline in the armed forces.

On 26 May 21, the applicant provided a response to the NJP.

On 11 Aug 21, the [W:] AF/CC found the applicant guilty of all charges and specifications as alleged. For this misconduct, he imposed the punishment of forfeitures of \$4,613.00 pay per month for two (2) months and a reprimand.

On 23 Aug 21, the applicant appealed the NJP action.

On 2 Sep 21, according to [Work-Pr...]/CC’s memorandum addressed to Air Combat Command’s Deputy Commander (ACC/CD), he denied the applicant’s appeal.

On 30 Sep 22, according to AF Form 707, *Officer Performance Report (Lt thru Col)*, he received a referral OPR from his rater, the squadron commander. Specifically, Section 3, *Performance*

Factors reflects “Does Not Meet Standards.” Section XI, *Referral Report*, contains the following statement: the rating of “Does Not Meet Standards” for Block 3, *Professional Qualities* and the comments captured in Section IV, bullet 6. Investigation revealed that you engaged in an inappropriate extramarital relationship and harassed a junior officer and shared information about your extramarital relationship with other service members junior in rank to you.” On 3 Oct 22, the applicant provided a rebuttal to the referral OPR.

On 11 Oct 22, the Additional Rater, his group commander, after having carefully considered the applicant’s rebuttal, signed and concurred with the rater’s assessment.

On 12 Oct 22, the Reviewer, [REDACTED] AF/CC, concurred and signed.

On 17 Oct 22, the applicant signed and acknowledged all required feedback was accomplished during the reporting period and upon receipt of this report.

On 19 Dec 22, according to applicant’s memorandum, *Written Presentation to Notification of Vacation Proceedings and Request to Set Aside Prior Nonjudicial Punishment Action*, the applicant requested [REDACTED] AF/CC to set aside his NJP action.

On 13 Feb 24, according to *Action on behalf of the Secretary of the Air Force* instrument, it was determined the applicant did not serve satisfactorily in the grade of O-5/Lieutenant Colonel, within the meaning of Section 1370(a) of Title 10, United States Code. However, it was determined he did serve satisfactorily in the grade of O-4/Major, and it is directed he be retired in that grade.

On 30 Jun 24, according to his DD Form 214, *Certificate of Release or Discharge from Active Duty*, reflects he was honorably retired in the grade of lieutenant colonel with the narrative reason of “Sufficient Service for Retirement” and credited with 22 years, 5 months, and 21 days of total active service.

On 1 Jul 24, according to Special Order Number [REDACTED] dated 29 Feb 24, the applicant was retired in the grade of Major in accordance with AFI 36-3203.

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

APPLICABLE AUTHORITY/GUIDANCE

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*). 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. 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. Adverse information includes, but is not limited to:

1.2.1.3. Nonjudicial punishment pursuant to Article 15, UCMJ.

1.2.3. All adverse information as defined by this instruction will be permanently placed in the MPerRGp. **(T-0)** Except for the set aside of a court-martial or nonjudicial punishment, removal of adverse information from the MPerRGp may only be directed pursuant to an Air Force Board for Correction of Military Records (AFBCMR) recommendation.

2.2. Standard of Proof. The Standard of Proof for adverse administrative actions is the “preponderance of evidence.” This standard will be used when evaluating the evidence and every element of the alleged offenses. A preponderance of the evidence exists when it is more likely than not that events have occurred as alleged. Preponderance of the evidence is not determined by the number of witnesses or exhibits, but by all the evidence and evaluating facts such as a witness’ behavior, opportunity for knowledge, information possessed, ability to recall, as well as related events and relationships being considered. Consider whether such proof is available before initiating the administrative action. If such proof is lacking, administrative action may be determined legally insufficient and, as a result, could be set aside. There is no requirement to prove any allegation beyond a reasonable doubt.

3.2.1. Officer UIFs. Optional documents (LOA and LOC) for officers are referred to the offending member with a DAF Form 1058, *Unfavorable Information File* before establishing a UIF. For mandatory documents (Article 15s, LOR, court-martial or civilian court convictions), the DAF Form 1058 does not need to be referred to the officer for a response. Should a member be issued an AF Form 3070C, *Record of Nonjudicial Punishment Proceedings (Officer)*, (for ANG use AF Form 3070D, *Record of Nonjudicial Punishment Proceedings (Officer) – Air National Guard Only*) then a DAF Form 1058 is not required because the UIF is established with the AF Form 3070C/E alone.

AFI 36-2406, **Officer and Enlisted Evaluation System**. 10.2.4.10.2.3. For the Evaluation Report Appeals Board to decide favorably to void the evaluation, the applicant must prove by a preponderance of the evidence that the behavior did not take place and the corrected action taken was officially set aside and not just removed or expired.

Air Force Manual (AFMAN) 36-2806, **Awards and Memorialization Program**, 3.24.7. No member is automatically entitled to a decoration upon a permanent change of station, permanent change of assignment, retirement, separation, completion of a temporary duty, or reaching or achieving other career points at which a decoration may be expected or customarily awarded.

AIR FORCE EVALUATION

AF/JAJI recommends denying the request. The **Work...** Operations Group commander offered the applicant NJP for one specification of failure to obey a general lawful regulation, in violation of UCMJ, Article 92; three (3) specifications of conduct unbecoming an officer and gentleman, in violation of UCMJ, Article 133; and one specification of extramarital sexual conduct, in violation of UCMJ, Article 134. The NJP stemmed from allegations of sexual harassment, an extramarital affair, and sharing information about extramarital relationships with junior service members during a temporary duty to **Work-Product** Air Base, Japan. The substance of the offenses alleged in the NJP, plus other alleged offenses, were originally preferred to a general court-martial. Following

a preliminary hearing under UCMJ, Article 32, the convening authority determined court-martial charges were not appropriate and the case was returned to the applicant's squadron commander for further disposition. NJP was subsequently offered.

The applicant consulted with a lawyer, waived his right to court-martial and accepted NJP proceedings, provided a written presentation, and requested a personal appearance. After considering the evidence and matters presented by the applicant, the [REDACTED] AF/CC found the applicant committed all offenses alleged and that NJP was appropriate. The applicant's punishment consisted of forfeiture of \$4,613 pay per month for two months and a reprimand. The applicant appealed and submitted matters in writing. His appeal was denied by both the [REDACTED] AF/CC and the appellate authority.

Following the applicant's NJP, a UIF was established, he was given a referral OPR, and a "Do Not Promote" on this promotion recommendation form (PRF) for his colonel (O-6) board. An officer grade determination (OGD) concluded he did not serve satisfactory in the grade of lieutenant colonel and directed he be retired in the grade of major. He subsequently retired with an honorable service characterization in the grade of major.

Because, in accordance with DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 3.4.4, "[t]he applicant has the burden of providing evidence in support of their allegation(s) of an error or injustice," the BCMR is bound to draw every reasonable inference from the evidence in favor of the principals who resolved questions of fact and took actions at issue. Deference is not blind as the BCMR can reverse an arbitrary or capricious decision for an abuse of authority (*Roberts v. United States*, 741 F.3d 152, 158 (D.C. Cir 2014) (reviewing decision of a military corrections board under an "unusually deferential application of the 'arbitrary or capricious' standard"))

In accordance with AFI 51-201, *Nonjudicial Punishment*, paragraph 3.4, a rational factfinder could conclude there was proof beyond a reasonable doubt the alleged misconduct occurred under the effective standard of proof at the time of the NJP. The UIF, referral OPR, "Do Not Promote" on the PRF, and OGD were follow-on actions to the NJP. Applicant's case was considered by multiple reviewing authorities in processing the initial and follow-on actions. Every reasonable inference from the evidence supports the decisions of the principals who resolved questions of fact and took the actions at issue.

There is insufficient evidence to demonstrate a legal error or injustice.

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 1 Aug 24 for comment (Exhibit D), but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed.
2. The applicant did exhaust all available non-judicial relief before applying to the Board.

3. After reviewing all Exhibits, the Board concludes the applicant is not a victim of an error or injustice. The Board concurs with the rationale and recommendation of AF/JAJI and finds a preponderance of the evidence does not substantiate the applicants contentions. While the applicant contends his due process rights were violated by the [REDACTED] Air Force Commander on “multiple fronts,” and that the NJP determination was contradictory to the evidence, the Board disagrees. The Board notes the applicant clearly accepted the Article 15 and elected not to demand trial by court-martial as he consulted with a lawyer, waived his right to court-martial and accepted NJP proceedings, provided a written presentation, and requested a personal appearance. After considering the evidence and matters presented by the applicant, the [REDACTED] AF/CC found the applicant committed all offenses alleged and that NJP was appropriate. As such, the Board finds the NJP action was within the commander’s authority and the evidence presented does not demonstrate an error or injustice warranting removal of the NJP or show it was unjust or inaccurate as written. Furthermore, the Board finds the applicant was provided due process with multiple levels of review and in accordance with DAFI 36-2907, *Adverse Administrative Actions*, the applicant’s meets the above criteria and should remain a part of his record. In view of the above, the Board finds the subsequent adverse administrative actions (Unfavorable Information File, referral Officer Performance Report, Do Not Promote on his Promotion Recommendation Form and Officer Grade Determination) were appropriate follow-on actions to the NJP. We also note the applicant requests repayment of forfeited pay and allowances, with adjustment for inflation, pay raises, and/or lost interest; consideration for promotion by a SSB to the grade of colonel; and award of the MSM, since we find no error with the adverse administrative actions and in absence of evidence to the contrary, we find no basis to recommend granting any of the relief sought in this application. Therefore, the Board recommends against correcting the applicant’s record.

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-2024-01599 in Executive Session on 11 Feb 25:

[REDACTED] Panel Chair

[REDACTED] Panel Member

[REDACTED] Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 12 Apr 24.

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

Exhibit C: Advisory Opinion, AF/JAJI, dated 19 Jul 24.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 1 Aug 24.

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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.

4/8/2025

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Board Operations Manager, AFBCMR

Signed by:

Work-Product

AFBCMR Docket Number BC-2024-01599

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