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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-03747

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COUNSEL: Work-Product

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. His Article 15, dated 4 Jan 24, be removed from his record.
2. His grade of technical sergeant (E-6) be restored.
3. He be awarded any other just and equitable relief.

APPLICANT'S CONTENTIONS

Counsel, on behalf of the applicant, contends the Article 15 findings are not supported in law and do not comport with the required mental state or elements of the charged offenses.

He is a reservist and was deployed in Nov 23 when a complaint of assault and sexual harassment was made against him by [redacted], a female senior airman (E-4). An investigation was conducted by security forces. The investigators did not take a single sworn statement from any complainants or witnesses. The allegation was unsubstantiated after it was revealed the complainant had sent him a sexually suggestive photo of herself and lied about it. During the investigation, another airman made an allegation she was sexually harassed by him. This allegation was previously unreported. She contended he harassed her verbally about her thigh tattoo. He disputes the characterization of the statement and at the time he did not know she had a thigh tattoo. She confirmed he did not know about her thigh tattoo at the time. She also reported she was married and she did not consent to him flirting with her during the deployment. He respected her request and he did not flirt with her.

In his response to the Article 15, he explained the background of his relationship with [redacted]. She disclosed to him she was engaging in an extramarital sexual affair and she had to be corrected multiple times by him for her conduct at work throughout the deployment. He perceived she was attempting to get him to engage in sexual conduct with her but he declined to pursue her. He reported to the commander he believed the false allegations were a form of self-preservation because she was worried he would report her extramarital sexual conduct. His commander took no action in response to this information. He appealed the Article 15; however, his appeal was denied. He asked his new commander to set aside the Article 15; however, he declined to overturn the issuing commander.

In accordance with Article 134, Uniform Code of Military Justice (UCMJ), the following elements by a preponderance of the evidence must be met for a guilty finding of sexual harassment: (1) The accused knowingly engaged in conduct of a sexual nature. (2) The conduct was unwelcome. (3)

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Such conduct was so severe, repetitive or pervasive that a reasonable person would perceive an intimidating, hostile or offensive working environment. (4) The conduct was to the prejudice of good order and discipline in the Armed Forces and be of a nature to bring discredit upon the Armed Forces.

There is no allegation he ever propositioned [redacted], sent her anything sexual or explicit or that he sexually harassed her. To be clear, the command chose to disbelieve her. There is also no evidence he intended to engage in a prohibited relationship with [redacted]. Regarding the allegation he asked for permission to flirt with [redacted], there is nothing harassing about asking permission and then respecting the answer. There were no issues after this allegedly occurred between him and [redacted].

The failure of the investigation should weigh in his favor by demonstrating that the general weight of the evidence against him is very low. The Article 15 should be removed and all rights and privileges must be restored.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is an Air Force Reserve staff sergeant (E-5).

The applicant provides the Expeditionary Security Forces Office of Investigations (SFOI) Report of Investigation (ROI) dated 3 Jan 24. The ROI shows the applicant was investigated for the offense of assault consummated by a battery, Article 128, UCMJ; and Sexual Harassment, Article 134, UCMJ. The investigation was initiated on 18 Nov 23 based on information provided by [redacted] that the applicant had been sexually harassing her and that she initially made the report to the Equal Opportunity Office (EEO). The ROI reflects the SFOI substantiated that the applicant on multiple occasions made unwanted sexual comments and offered unwelcomed sexual advances. All elements were met to charge the applicant with Sexual Harassment, Article 134, UCMJ. The SFOI further substantiated that on one occasion, the applicant assaulted [redacted] by touching her without consent, after she explicitly requested not to be touched by the applicant. All elements were met to charge the applicant with Assault Consummated by a Battery, Article 128, UCMJ. The SFOI was unable to substantiate the applicant on one occasion assaulted [redacted] by touching her without consent.

AF Form 3070B, *Record of Nonjudicial Punishment Proceedings (TSgt thru CMSgt)*, dated 4 Jan 24, reflects the applicant received an Article 15. Between 14 Oct 23 and 17 Nov 23, while deployed, he attempted to violate a lawful order, AFI 36-2909, *Air Force Professional Relationships and Conduct*, by failing to refrain from pursuing an unprofessional relationship with [redacted], an airman he had authority over. Additionally, between 10 Oct 23 and 11 Nov 23, he knowingly engaged in conduct of a sexual nature by saying to [redacted] he found thigh tattoos sexy, he wanted to grab them and asked if it was okay for him to flirt with her during the deployment and such conduct was unwelcome. Under the circumstances, the conduct was so severe, repetitive or pervasive that a reasonable person would perceive, and [redacted] did perceive an intimidating, hostile or offensive working environment; and that such conduct was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces. The applicant was reduced from the grade of technical sergeant (E-6) to the grade of E-5 with a new date of rank (DOR) of 29 Jan 24. On 8 Feb 24, the wing judge advocate (WG/JA) found the record legally sufficient.

In his response to the Article 15, dated 13 Jan 24, the applicant states he was completely unaware any of his co-workers had negative perceptions of him. There were many instances where he was either misquoted, misunderstood and in some instances the statements were complete lies and fabrications. He accepted responsibility and asked that if the Article 15 was upheld that he not lose a stripe as it would result in him being forced to retire in the grade of E-5.

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

AIR FORCE EVALUATION

AF/JAJI finds insufficient evidence to recommend relief on the basis of legal error.

Following an investigation and after considering his written presentation, the applicant's squadron commander (SQ/CC) found he committed one specification of attempted unprofessional relationship with [redacted] and one specification of sexual harassment of [redacted]. His SQ/CC determined he was not guilty of the second sexual harassment specification. The SQ/CC imposed punishment consisting of reduction in grade from E-6 to E-5 and a reprimand. The NJP was placed in an unfavorable information file (UIF) and both the servicing legal office and general court martial convening authority legal office found the NJP legally sufficient.

Counsel alleges the findings of the NJP are not legally supported by the evidence and the SFOI conducted a faulty investigation because investigators failed to obtain sworn statements from witnesses. Because the applicant has the burden of providing evidence, the AFBCMR, in accordance with Department of the Air Force (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, is bound to draw every reasonable inference from the evidence in favor of the principals who resolved questions of fact and took the actions at issue. Deference is not blind as the AFBCMR can reverse an arbitrary or capricious decision for an abuse of discretion.

A rational factfinder could conclude it more likely than not the alleged misconduct occurred under the applicable preponderance of the evidence standard. Per DAFI 51-202, *Nonjudicial Punishment*, every reasonable inference from the evidence supports the decisions of the principals who resolved questions of fact and took the actions at issue. All procedural and due process requirements were complied with. There is no evidence of an abuse of discretion. The applicant's commander even found him not guilty of one of the sexual harassment specifications after consideration of his submitted matters. His rank at the time, compared with that of the two named female airmen were probable factors in the commander's findings. The witness statements about the applicant's behavior in the work center provided additional context to the offenses. Reduction of one grade from E-6 to E-5 by the imposing commander, a lieutenant colonel (O-5), is a permissible punishment per DAFI 51-202. Additionally, there is no requirement that witness statements relied upon as evidence in support of NJP action must be sworn.

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 3 Apr 25 for comment (Exhibit D), and the counsel replied on 5 Apr 25. Counsel contends the advisory opinion's recommendation that the AFBCMR deny relief based on the assertion the AFBCMR is bound to draw every reasonable inference from the evidence in favor of the principals who resolved questions of fact

and took the actions at issue is a misstatement of the law. The Board has the discretion to draw reasonable inferences in favor of an applicant. It is up to the Board to review evidence and make reasonable inferences either way. That is the inherent discretion a Board has when it reviews evidence.

The advisory opinion also states federal law that “deference is not blind.” Again, the case that is cited is referring to the deference that federal courts show to the AFBCMR’s exercise of discretion. It is not a statement of the deference that the AFBCMR should be showing to the commander’s decision in any particular case. The law requires that the AFBCMR employ a “preponderance of the evidence” standard. Accordingly, the entire basis that the advisory opinion recommended denying relief is based on a misapplication of the law that the Board is required to follow.

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 AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant’s contentions. The applicant alleges the findings of the SFOI ROI and NJP are not legally supported by the evidence and the SFOI conducted a faulty investigation. The Board conducted an independent review of the applicant’s complete case and finds the applicant has not sustained his burden of proof to warrant removal of the Article 15 and restoration of his grade of E-6. In this respect, the SFOI ROI, to include witness testimony, substantiated the applicant engaged in sexual harassment of a subordinate, in violation of Air Force standards and expectations for noncommissioned officers (NCO). The applicant has provided insufficient evidence to show he did not commit the misconduct for which he received the NJP. Further, there is no evidence the investigation was faulty or that it was conducted contrary to regulations. The evidence shows his SQ/CC carefully considered the evidence to include the ROI, witness testimony and the applicant’s statements before issuing the NJP. While the applicant contends the NJP was based on a misapplication of the law, there is no evidence to indicate this to be the case. Moreover, the applicant’s NJP underwent a legal review and on 8 Feb 24 was found legally sufficient by the WG/JA. 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 DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2024-03747 in Executive Session on 30 May 25:

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Panel Chair
Panel Member
Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 22 Oct 24.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AF/JAJI, dated 20 Feb 25.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 3 Apr 25.
- Exhibit E: Applicant's Response, dated 5 Apr 25.

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.

6/13/2025

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