

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

FEB 12 1999

IN THE MATTER OF:

DOCKET NUMBER: 97-00997

COUNSEL: None

HEARING DESIRED: Yes

APPLICANT REQUESTS THAT:

1. The Letter of Reprimand (LOR), dated 25 Jul 96, be removed from his **records**.
2. An Unfavorable Information File (UIF) established as a result of receiving the LOR be removed from his records.
3. The Enlisted Performance Report (EPR) rendered for the period 2 Feb 96 through 1 Feb 97 be declared void and removed from his records.
4. Any Air Force Office of Special Investigations (AFOSI) indexes listing his name be deleted.
5. His command Apologize to his wife for the anguish and isolation she has endured.

APPLICANT CONTENDS THAT:

He followed all trained procedures and AFOSI written guidelines when performing three apprehensions on the same day but because of false allegations by a confessed criminal pending a bad conduct discharge (BCD), he was sanctioned. The justification involved a "feeling" of wrongdoing by his command versus the comparison of the act to an objective standard. Quite simply, he did nothing wrong but now has to prove his innocence. He has undertaken this backwards burden by passing two polygraph examinations which directly demonstrate his innocence. His command has yet to acknowledge the tests or even interview him.

In support of his appeal, the applicant provided a five-page statement, letters and certificates for training and awards, previous APRs/EPRs, and other documentation relating to his appeal.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

The applicant's Total Federal Active Military Service Date (TAFMSD) was 13 Aug 84.

Applicant's APR/EPR profile follows:

<u>PERIOD ENDING</u>	<u>OVERALL EVALUATION</u>
12 Aug 85	9
12 Aug 86	9
12 Aug 87	9
12 Aug 88	9
12 Aug 89	9
31 Mar 90	5 (New rating system)
31 Mar 91	5
31 Mar 92	5
31 Mar 93	5
31 Mar 94	5
31 Mar 95	5
1 Feb 96	5
* 1 Feb 97	3

* Contested report-

On 13 May 96, while performing duties as a Special Agent (SA) assigned to the AFOSI at Little Rock AFB, the applicant apprehended a senior airman in the course of a drug investigation. The airman later complained that the applicant had used excessive force in apprehending him by placing handcuffs on too tight.

On 25 Jul 96, the applicant received a LOR for use of excessive force while apprehending another Air Force member. The applicant provided a rebuttal statement, dated 2 Aug 96. However, the commander still elected to file the LOR in an UIF.

The applicant provided a copy of a polygraph examination administered to him by the Arkansas Bureau of Investigation on 18 Mar 97. The **results** of the test indicated the applicant was truthful on the polygraph examination. There is no copy of a Federal Bureau of Investigation (FBI) polygraph report in applicant's records or in his application.

Computer printouts reflect the applicant had a date of separation of 9 Mar 98. After checking with officials at the Air Force Personnel Center, it appears that applicant was separated from the Air Force; however, there is no indication why or when he separated.

AIR FORCE EVALUATION:

The NCOIC, Quality Force & Commander's Programs Office, AFPC/DPSFC3, reviewed this application and indicated that the use of the LOR by commanders and supervisors is an exercise of supervisory authority and responsibility. The LOR is used to reprove, correct and instruct subordinates who depart from acceptable norms of conduct or behavior, on or off duty, and helps maintain established Air Force standards of conduct or behavior. Commanders have the option of filing LORs in an UIF. UIFs may be used by commanders to form the basis for a variety of adverse actions as they relate to the member's conduct, bearing, behavior, integrity, and so forth (on or off duty), or less than acceptable duty performance. Commanders may also remove an enlisted member's UIF prior to the disposition/expiration date, if they feel the UIF has served its purpose. A commander refers the documents to the member for presentation of possible mitigating facts via AF Form 1058 (Unfavorable Information File Action) before deciding whether the documents should be placed in the UIF. Establishment of a UIF on a member assigned to his unit is within a commander's inherent authority to command. The applicant's LOR was filed in a UIF. Once the UIF expires, normally one **year** after the document's effective date (unless new documentation is added to the UIF), the entire UIF is destroyed and the LOR would be destroyed as part of the UIF. New documentation added to the UIF would extend the disposition date of the UIF to reflect the date of the new document plus one to two years (based on the document). The LOR would then remain in the UIF until the new disposition/expiration date. The applicant's current UIF expiration date is 25 Jul 97. Again, the applicant's commander had the option to remove the LOR/UIF at any time prior to its expiration. DPSFC3 feels that denial is appropriate. The applicant had an opportunity to provide rebuttal to the LOR. Commanders have no obligation to remove LORs unless they feel information provided in rebuttals warrants removal.

A complete copy of the Air Force evaluation is attached at Exhibit C.

The Chief, Inquiries/AFBCMR Section, AFPC/DPPPWB, reviewed this application and indicated that the first time the contested report will be considered in the promotion process is cycle 98E6 to technical sergeant (promotions effective Aug 98 - Jul 99). Should the Board void the contested report in its entirety, or upgrade the overall rating, providing he is otherwise eligible, the applicant will be entitled to supplemental promotion consideration beginning with cycle 98E6 providing he is not selected during the initial 98E6 cycle. However, if the EPR is voided and the favorable results received by 15 May 98, no supplemental consideration would be required as there would be sufficient time to update the promotion file. Initial selections will be released on 4 Jun 98 with selections approximately two weeks earlier.

A complete copy of their evaluation is attached at Exhibit D.

The Inquiries & Complaints Branch, AFOSI/IGQ, reviewed this application and indicated that a review of the Defense Central Index of Investigations (DCII) disclosed no AFOSI indexes with the exception of the basic index of all AFOSI personnel. The DCII is a computerized index maintained by Defense Investigative Services and it identifies records held by any Department of Defense (DOD) component.

A complete copy of their evaluation is attached at Exhibit E.

The Chief, BCOMR Appeals & SSB Section, AFPC/DPPAB, reviewed this application and indicated that Air Force policy is that an evaluation report is accurate as written when it becomes a matter of record and it takes substantial evidence to the contrary to have a report changed or voided. To effectively challenge an EPR, it is important to hear from all the evaluators from the report—not only for support but for clarification/explanation. The applicant has not provided any information from the evaluators on the contested report. In the absence of evidence from the evaluators, official documentation substantiating injustice from the Inspector General (IG) or Social Actions is appropriate. While the applicant includes results from a polygraph test supporting his claim in relation to the LOR, the contested EPR does not specifically state the incident mentioned in the LOR is tied to the assigned ratings and no official evidence has been provided proving the EPR is invalid in this case. The report appears to have been accomplished in accordance with Air Force policy in effect at the time it was rendered. In the absence of error or injustice, they recommend denial of the applicant's request to void the 1 Feb 97 EPR.

A complete copy of their evaluation is attached at Exhibit F.

The Senior Attorney-Advisor, AFPC/JA, also reviewed this application and indicated that, as provided in AFI 36-2907, Chapter 3, the standard for issuing an LOR is whether sufficient evidence exists for the commander to conclude that the alleged offense occurred. Applicant apparently believes the findings of truthfulness made as a result of his polygraph examinations somehow fully rebut the evidence the commander relied on in imposing the LOR.

In regard to the EPR issue, procedures for appealing EPRs are contained in AFI 36-2401. The applicant did not submit an appeal or information from any of the evaluators on the contested report. In fact, neither the applicant nor the contested EPR ever directly states that the ratings and/or narrative comments specifically pertained to the incident involving use of excessive force but for purposes of JA's discussion, they assume that is the case. The applicant clearly has the burden of proving by cogent and clearly convincing evidence that his EPR contains

material errors or injustices. The level of evidence required is high because the applicant "must overcome the strong, but rebuttable, presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith." Applicant has failed to present any convincing evidence to support his conclusion that he is "factually innocent" of any wrongdoing in the excessive force incident.

The decisive factor in applicant's view is his "passing" a privately administered polygraph examination. As an aside, he complains that AFOSI did not offer him an opportunity to take a polygraph examination before he was sanctioned. Since no statute or regulation provides for a "right" to a polygraph test, the applicant has not been denied any legal entitlement. OpJAGAF 1986/113 (18 Sep 86) comments that results of polygraph tests "never have, nor should they be, dispositive of administrative actions in the military." In fact, in administrative proceedings, such results are only admissible if the government, respondent, and legal advisor agree. While the Court of Military Appeals has held that polygraph results are not *per se* inadmissible in judicial proceedings, that same court held that such results are not *per se* admissible:

[W]e have never held that [the Uniform Code of Military Justice] or any constitutional considerations give an accused the right to compel the Government to provide him a polygraph or any other examination which purports to test for "truthfulness." [Emphasis added.]

The rationale for this circumspect consideration of the admissibility of polygraph results in judicial or administrative proceedings is well founded. In the Employee Polygraph Protection Act of 1988, Congress severely limited the use of polygraphs in private sector employment decisions. In the legislative history of the Act, Congress noted that the American Medical Association had concluded "that the polygraph can provide evidence of deception or honesty in a percentage of people that is statistically only somewhat better than chance." Further, the Senate report reflects that:

Despite the popular perception that the (polygraph) machine is a "lie detector," most experts agree it is not. In addition to the charted responses, most examiners base their conclusions on the conduct of the examinee, the natural inclinations of the examiner, and on statements made during the examination.

Applicant's reliance on his polygraph test results is a classic example why consideration of these tests in judicial or administrative proceedings is so disfavored. In JA's opinion, his belief that the test results are exonerating demonstrates the ever present danger of confusion presented by such tests. The lack of precision in the questions propounded by the applicant's

polygrapher completely undermines the relevance of this examination. In applicant's case, JA believes the examiner's questions are so amorphous that the responses are, at best, meaningless. Thus, however, well intentioned, applicant's submission of the polygraph results does not assist him in meeting his burden of establishing an error or injustice in his records requiring action by the Board. While the applicant has submitted significant portions of his military record, including certificates, EPRs, letters of appreciation, and the like, these materials **have** no bearing on the specific misconduct which resulted in the administrative actions against the applicant.

JA indicated that, it is an axiomatic principle of administrative law that federal officials charged with official duties are presumed to carry out those responsibilities according to law, **i.e.**, a presumption of regularity, in the absence of proof to the contrary. The applicant has offered no proof that the LOR was imposed contrary to any law or regulation, nor has he established that the writers of the EPR acted illegally. Consequently, the LOR, attendant UIF entry, and EPR should remain in the record since the applicant has not proved any illegality.

JA further indicated that, to obtain relief, the applicant must show by a preponderance of evidence that there exists some error or injustice warranting corrective action by the Board. The effect of this burden of proof requires the applicant to present sufficient evidence to convince the Board it is more likely than not that relief is warranted. In JA's opinion, he has failed to meet this burden and his application should be denied in its entirety. They note that the thrust of applicant's argument is directed toward disproving the allegation of excessive force, rather than criticizing the administrative actions taken against him (assuming the validity of the accusation).

A complete copy of their evaluation is attached at Exhibit G.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Copies of the Air Force evaluations were forwarded to applicant on 7 Jul 97 for review and response. As of this date, no response has been received by this office.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.

3. Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice warranting removal of the contested report and any AFOSI indexes listing his name. After reviewing the evidence of record, we believe that the punishment applicant received was excessive in view of the circumstances surrounding the incident. While we normally would not substitute our judgment for that of the commander, we feel that the issuance of the contested UIF appears to be harsh. The punishment the applicant received, based on the offense and his overall excellent record of performance, appears to be severe. The evidence presented substantiates to our satisfaction that the applicant has been the victim of an injustice. While the applicant provided no documentation from the rating chain regarding the contested EPR, we believe that the rating on the EPR was based on receiving the LOR. Therefore, in order to offset any possibility of an injustice, we recommend the contested report be declared void and removed from his records.

4. In regard to applicant's request that any AFOSI indexes listing his name be deleted, AFOSI/IGQ has advised there are no indexes listing the applicant, with the exception of the basic index of all AFOSI personnel. It appears that the DCII is the sole method by which AFOSI indexes and retrieves reports of investigation. **The** basic index of all AFOSI personnel was a personnel listing not an index of investigations. In view of the foregoing, we find no basis upon which to recommend any AFOSI indexes listing his name be declared void and expunged from his record.

5. With respect to the applicant's request that the LOR, dated 25 Jul 96, and the UIF established as a result of receiving the LOR be removed from his records, we note that the UIF is destroyed within one year after the effective date and the expiration date was 25 Jul 97. Therefore, the UIF should no longer be in applicant's records. Although the applicant requests an apology to his wife for the anguish and isolation she has endured, this request is not within the Board's purview.

THE BOARD RECOMMENDS THAT:

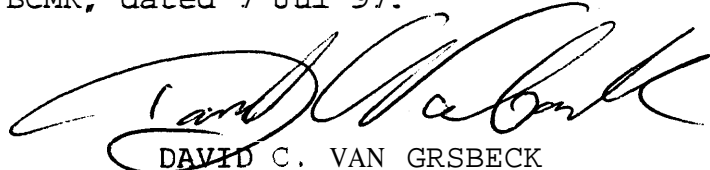
The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that the EPR, AF Form 910, rendered for the period 2 Feb 96 through 1 Feb 97 be declared void and removed from his records.

The following members of the Board considered this application in Executive Session on 29 January and 5 November 1998, under the provisions of Air Force Instruction 36-2603:

Mr. David C. Van Gasbeck, Panel Chair
Mr. Gregory H. Petkoff, Member
Mr. Steven A. Shaw, Member
Mrs. Joyce Earley, Examiner (without vote)

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 24 Mar 97, w/atchs.
- Exhibit B. Applicant's Master Personnel **Records**.
- Exhibit C. Letter, AFPC/DPSFC3, dated 16 Apr 97.
- Exhibit D. Letter, AFPC/DPPPWB, dated 21 Apr 97.
- Exhibit E. Letter, AFOSI/IGQ, dated 28 Apr 97.
- Exhibit F. Letter, AFPC/DPPPAB, dated 18 May 97.
- Exhibit G. Letter, AFPC/JA, dated 23 Jun 97.
- Exhibit H. Letter, AFBCMR, dated 7 Jul 97.



DAVID C. VAN GRSBECK
Panel Chair



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

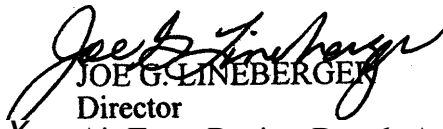
FEB 12 1999

Office of the Assistant Secretary
AFBCMR 97-00997

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Air Force Board for Correction of Military Records and under the authority of Section 1552, Title 10, United States Code (70A Stat 116), it is directed that:

The pertinent military records of the Department of the Air Force relating to [REDACTED] be corrected to show that the Enlisted Performance Report, AF Form 910, rendered for the period 2 February 1996 through 1 February 1997, be, and hereby is, declared void and removed from his records.


JOE G. LINEBERGER

Director
Air Force Review Boards Agency