RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: [redacted]

DOCKET NUMBER: 97-02698

NOV 27 1998

COUNSEL: [redacted]

HEARING DESIRED: No

APPLICANT REQUESTS THAT:

1. The administrative demotion to the grade of staff sergeant (SSgt) be removed from his record.

2. He be restored to the grade of technical sergeant (TSgt) with back pay.

3, The Enlisted Performance Reports (EPRs) rendered for the periods 1 March **1995** through 28 February **1996** and **29** February **1996** through 28 February **1997** be declared void and removed from his record.

4. He be provided promotion relief, either in the form of retroactive promotion to master sergeant (MSgt), or in the alternative, he be given supplemental promotion consideration,

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APPLICANT CONTENDS THAT:

Applicant's counsel states the commander violated the applicant's rights by denying him the right to face his accusers in a court room. He also contends that the commander violated specific provisions of AFI **36-2503** and that, therefore, the action taken against the applicant is legally insufficient and thus should be reversed.

Applicant's counsel also states that under the provisions of the Uniform Code of Military Justice (UCMJ), specifically 10 U.S. Code, Section 815, and the Manual for Courts-Martial, Part V, paragraph 3, an airman being offered Article 15 punishment has an absolute right to request that his case be considered by a court-martial. Line 5 of AF Form **3070** clearly and correctly allows the accused to demand a court-martial. Applicant desired and deserved that right because in his heart and mind he knew he had not committed the acts alleged. The acceptable options for a commander when an airman demands trial by court-martial is to either refer it to a court-martial, or to drop the action. In this case, the commander. elected to ignore applicant's exercise

of his statutory and constitutional rights and substituted an administrative process which deprives applicant of those rights. As admitted in the Air Force reply to a Congressional inquiry, the commander withdrew the Article 15 action because he did not consider the charges serious enough for a court-martial. That was not the commander's decision to make. He elected to resolve the matter through the military justice system, the decision on whether it should be court-martial was the applicant's decision and his right. This action by the commander in and of itself establishes both propriety and equitable bases for reversing the demotion action. The administrative demotion system does not permit the member to be faced by any accusers. It is essentially up to the discretion of the commander to do what he believes is best. It has none of the due process protections that are available under the military justice system.

Applicant's counsel further states the first sentence of AFI 36-2503 states "Don't use administrative demotions when it is more appropriate to take actions specified by ...(UCMJ)." It was clearly intended by AFI 36-2503 that the actions like those taken in applicant's case not occur. Paragraph 1.3 of AFI 36-2503 states that the entire military record must be considered in determining whether to demote. The applicant had an outstanding record. He received excellent evaluations, was promoted to TSgt at the 12 year point, which is ahead of his contemporaries, he received decorations and congratulations for his performance of duties. Applicant's 15-year service record does not support demotion action and was either overlooked or ignored by the demotion authority. Paragraph 1.4 of AFI 36-2503 requires the commander to allow the individual to overcome deficiencies prior to initiating action. Applicant had no prior incidents and rehabilitative efforts had not previously been initiated. Probation was not considered even though it would have been clearly appropriate in this case. The provisions of the instruction were ignored by the chain of command because they wanted to punish the applicant and they knew that under the military justice instructions they could not do so. Applicant had forced them into going to a court-martial, his defense counsel had clearly established legal defenses to the allegations, so they pressed on with their illegal administrative action, perhaps hoping that applicant would not challenge them or believing that even if their illegal action was ultimately reversed, their purpose would have been achieved.

In support of his request, he submits a copy of the Article 15, dated 23 June 1995, demotion action documentation, Excerpt from the UMCJ, Appendix 2, Congressional Inquiry Division letter to Senator Hutchison, excerpt from AFI 36-2503, five letters of appreciation.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

Applicant is currently serving in the Regular Air Force in the grade of SSgt.

On 23 June **1995,** the applicant was notified of his commander's intent to impose nonjudicial punishment upon him for: (1) making unwelcome and offensive sexual remarks to [redacted] and Senior Airman [redacted], (2) did maltreat [redacted] a person subject to his orders, by making unwelcome and offensive remarks such as, "we have to talk turkey," "I enjoy seeing you in your blues, it makes my day," or words to that effect. Also he verbally degraded her husband saying "he wasn't good, wasn't a man, and she shouldn't put up with him," and then compared yourself to him saying you were a "real man, knew how to treat a woman, and his wife was treated like a queen and that [redacted] deserved better," or words to that effect. All of the aforementioned actions created a hostile working environment.

On 27 June **1995,** after consulting with counsel, applicant demanded trial by court-martial.

On 30 October **1995,** applicant was notified of his commander's intent to recommend to the Commander, [redacted] Support Group, the demotion authority, that he be demoted to the grade of senior airman. The specific reason for the demotion is Failure to Fulfill Noncommissioned Officer (NCO) Responsibilities. Unprofessional behavior toward unit members' spouses and maltreatment of subordinates are indicators that applicant failed to fulfill his general NCO responsibilities of maintaining exemplary standards of behavior including personal conduct, loyalty and support of the Air Force directives concerning unwanted sexual behavior.

On 30 October **1995,** the applicant acknowledged receipt of the proposed demotion action, did not concur with the proposed demotion, would provide statements on his behalf, requested a personal hearing before the initiating commander, and that he consulted with counsel.

On 1 April **1996,** the [redacted] Support Group Commander demoted the applicant to the grade of SSgt with a date of rank and effective date of 1 April **1996.**

On **3** April **1996,** the applicant acknowledged receipt of the demotion action and elected to appeal.

On **29** April **1996,** the Wing Commander disapproved the applicant's appeal.

EPR profile since **1993** reflects the following:

	PERIOD ENDING	EVALUATION OF POTENTIAL
	28 Feb **93**	**5**
	28 Feb **94**	**5**
	28 Feb **95**	**5**
*	**28** Feb **96**	**2** (Referral)
*	**28** Feb **97**	**3** (Downgraded from a 4)

* Contested Reports

AIR FORCE EVALUATION:

The Chief, Inquiries/AFBCMR Section, AFPC/DPPPWB, reviewed this application and states that the first time the applicant became ineligible for promotion consideration was February **1996** when his promotion eligibility status (PES) code was N. This rendered him ineligible for promotion consideration for cycle **9737** as outlined in AFI 36-2502, Table 1.1, Rule L. Also, PES code N was used to identify an individual with a referral EPR, as for the EPR closing **28** February **1996.** The fact that the EPR was a "2" report alone, would have rendered him ineligible for promotion for the 97E7 cycle (promotions effective August **1997** - July **1998).** He was demoted to SSgt with a date of rank of 1 April **1996** and will be eligible for promotion consideration to TSgt for the **98E6** cycle (promotions effective August **1998** - July 1999), which would include the EPR closing **28** February **1997.** It is their opinion the demotion action taken against the applicant was procedurally correct and there is no evidence there were any irregularities or that the case was mishandled. There are no provisions to authorize an automatic promotion to MSgt except by the AFBCMR, Chief of Staff of the Air Force, or the Stripes for Exceptional Performers (STEP) program, nor do they recommend this be done. However, should the AFBCMR grant the applicant's request, he will be entitled to have his former grade of TSgt reinstated with a date of rank of 1 January **1993.** In addition, providing he is otherwise eligible and recommended by his commander, he would be entitled to supplemental promotion consideration to MSgt beginning with cycle **9637.**

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

The BCMR and SSB Section, AFPC/DPPPAB, reviewed the application and states that to effectively challenge an EPR, it is important to hear from all the evaluators on the contested report - not only for support, but for clarification/explanation. The applicant did not provide any evidentiary support from the evaluators to substantiate error or injustice. In the absence of information from evaluators, official substantiation of error or injustice from the Inspector General (IG) or Social Actions is

appropriate, but not provided in this case. The appeals process does not exist to recreate history or enhance chances for promotion. It appears this is exactly what the applicant is attempting to do - recreate history. The contested EPRs were rendered to the applicant as a result of substantiated unacceptable behavior. They find it interesting the applicant chose not to include a copy of the official Report of Investigation conducted by the security police. However, the commander obviously considered their findings and found they supported the allegations of sexual harassment brought against the applicant by the women. Further, it is apparent he found the matter to be a serious offense worthy of reproof and took immediate and appropriate action. The fact is, the applicant was expected to maintain standards of conduct and responsibility at least as stringent as the rest of the noncommissioned officer corps. The applicant was involved in substantiated incidents of sexual harassment and was removed from his duties as a supervisor. They understand the applicant's desire for the board to direct voidance of the contested EPRs because of the promotion advantage. However, to remove the EPRs from his record would be unfair to all the other NCOs who did not sexually harass their subordinates' wives and coworkers, and effectively performed their duties. They, therefore, conclude removal of the contested reports would make the applicant's record inaccurate.

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

The Senior Attorney-Advisor, AFPC/JA, reviewed the application and states that they agree with the comments of HQ AFPC/DPPPAB and HQ AFPC/DPPPWB, and concur in their recommendations to deny relief. The relief sought for removing the EPRs in question, restoring applicant's previously held rank of TSgt or retroactively promoting him to MSgt, and removing the documents he has requested might merit consideration only if the underlying administrative demotion action was removed. Counsel's argument that once an accused demands trial by court-martial, it is essentially a "put up or shut up" situation, is not supported by any authority. The fact that para 3.3, AFI 51-202, cautions that commanders should recognize that alleged offenders may demand trial by court-martial (requiring proof beyond a reasonable doubt), in no way ties a commander's hands to the extent he cannot withdraw the Article 15, UCMJ, action and proceed by way of administrative demotion action. The reality that such administrative actions may require a lesser standard of proof or provide a lesser degree of due process protection than a trial by court-martial, does not preclude their use after termination of proceedings which might otherwise lead to a trial by court-martial. In their opinion, the action of the applicant's commander in administratively demoting him was both procedurally and substantively correctly taken. The commander determined, for reasons they are unable to pinpoint (particularly since the applicant chose not to provide a copy of the underlying investigation), that administrative action was more appropriate than judicial action. That may have occurred for any number of

reasons. He may have determined insufficient evidence was available to constitute proof beyond a reasonable doubt. He may have determined the gravity of the sexual harassment incident did not warrant subjecting applicant to trial by court-martial, but rather was more appropriately handled administratively. Whatever the reason for withdrawing the Article 15 action, the language pointed out by counsel does not prohibit administrative action. That language, in their opinion, was designed to provide guidance to commanders that if a court-martial is warranted, pursue it - do not confer unwarranted leniency by not pursuing appropriate criminal charges. The fact that the course of action chosen by the commander affords fewer protections to the applicant, such as confronting the witnesses against him and proof beyond a reasonable doubt, is perfectly acceptable and complies with concepts of fairness and equal protection, since the peril to which an accused in a trial by court-martial is subjected is much greater than that in an administrative action. Loss of liberty far outweighs loss or rank on the spectrum of punitive and administrative consequences,

AFPC/JA also states counsel states para 1.4, AFI 36-2503, was violated by the commander because the applicant was not given an opportunity to overcome deficiencies prior to initiating the demotion action. That paragraph begins "When appropriate, give airmen an opportunity to overcome their deficiencies before demotion action is initiated." Apparently, applicant has consistently and completely denied the legitimacy of the allegations of sexual harassment against him. It seems inconsistent to them how applicant could be afforded an opportunity to overcome deficiencies he denies having. This is not to say an opportunity to overcome deficiencies would be appropriate even if applicant admitted wrongdoing - his conduct may have been of such a nature that allowing him to overcome deficiencies was not warranted, For the reasons outlined above, it is their opinion the application should be denied in its entirety. Applicant has failed to present evidence of any error or injustice warranting relief.

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

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant reviewed the advisory opinions and states he did everything in accordance with regulations when the Article 15 was offered and he chose a court-martial. His squadron did not treat him justly. He was caught in a Catch 22. All he asked for was a chance to defend himself and face his accusers. He was tried, convicted, and punished without being allowed to step foot in a court-room, based on statements alone. Even if he had gone to a court-martial and lost, he may not have lost a stripe, because everything would have been taken into consideration (i.e., his EPRs, awards, decorations and history). AFPC/JA points out that

the administrative demotion is considered a more lenient form of action and a court-martial is more perilous, that the loss of liberty far outweighs loss of rank on the spectrum of punitive and administrative consequences. This would be true if there was a form of defense in an administrative demotion. All he was able to do to defend himself was turn in character statements, nothing to refute the allegations. Just because he is active duty, shouldn't mean that he doesn't have the constitutional right to face his accusers.

Counsel reviewed the Air Force evaluations and states the AFPC/JA advisory ignores the factual circumstances of what occurred at Wright Patterson AFB. The commander clearly consulted JA and the determination was made under the regulation that there was sufficient evidence to proceed with military justice action. The decision was made that it was "appropriate to take actions specified under the UCMJ." The JA believed this, the commander believed this, and applicant believed it, that is why he exercised his right to have his case tried by a court-martial, rather than by the commander who had already made the decisions against him. Therefore, the prohibition in the demotion regulation is clearly applicable here. The commander should not have resorted to administrative action. If the allegations made against applicant had any validity, they should have been sent to a trier of fact to determine if they were true. The test was not whether the commander thought he could win a court-martial, or whether the lesser burden of proof might be more in his favor in an administrative action, the test was whether the matter was one that should go through military justice channels. Nothing in the advisory suggest that the case was not serious enough for military justice action. When applicant chose to exercise his legal rights and confront his accusers, the commander changed course and elected an entirely different forum in which the applicant had no rights, no confrontation, and no appeal. The commander could not take a stripe under the UCMJ so he took it administratively.

Applicant's/Counsel's complete responses are attached at Exhibit G.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.

2. The application was timely filed.

3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. Applicant's contentions that the commander violated his rights by denying him the right to proceed to trial by court-martial and that the commander violated specific provisions of AFI 36-2503 in

demoting him is unsubstantiated. The Board is of the opinion that the withdrawal of the Article 15, UCMJ, action and proceeding with the administrative demotion action was well within the commander's purview. In regards to the applicant's request that the EPRs rendered for the periods 1 March 1995 through 28 February 1996 and 29 February 1996 through 28 February 1997 be removed from his record, we note that the applicant has not submitted any supporting documentation from the rating chain and has failed to provide sufficient evidence showing that the reports were not an accurate assessment as rendered. In view of the above findings, we agree with the opinion and recommendations of the Air Force. We find no evidence of error in this case and after thoroughly reviewing the documentation that has been submitted in support of applicant's appeal, we do not believe he has suffered from an injustice. Therefore, based on the available evidence of record, we find no basis to recommend granting the relief sought in this application.

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 29 October 1998, under the provisions of AFI 36-2603:

Mr. Vaughn E. Schlunz, Panel Chair
Mr. Loren S. Perlstein, Member
Mr. Terry A. Yonkers, Member
[redacted]

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 4 Sept 97, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, AFPC/DPPPWB, dated 3 Mar 98, w/atch.
Exhibit D. Letter, AFPC/DPPPAB, dated 5 Mar 98.

Exhibit E. Letter, AFPC/JA, dated 31 Mar 98.
Exhibit F. Letter, AFBCMR, dated 20 Apr 98.
Exhibit G. Applicant/Counsel's Response, dated 10 Jun 98.

VAUGHN E. SCHLUNZ
Panel Chair