

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 97-02718

COUNSEL: NONE

HEARING DESIRED: NO JUL 20 1998

APPLICANT REQUESTS THAT:

1. The Enlisted Performance Report (EPR), rendered for the period 1 February 1992 through 31 January 1993, be declared void and removed from his records.
2. He be reconsidered for 'promotion to the grade of staff sergeant (E-5) with all back pay.

APPLICANT CONTENDS THAT:

The indorser of the contested report was not in his (applicant's) rating chain, nor had knowledge of him and his duty performance. The correct indorser was available and did not indorse as directed by Air Force Instructions. The ratings which were given were completely unfounded.

In support of his appeal, applicant submits a statement from the rater of the EPR in question. The rater stated that he originally rated the applicant an overall "5" rating. However, he allowed himself to be coerced by the commander into changing the rating to a "4." The indorser of the EPR in question states that the ratings he and the rater assigned were driven by the Group Commander's policy at the time, i.e., an Article 15 for an intimate relationship with a trainee by a permanent party member leads to a "1" or "2" rating on the EPR.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

Applicant is currently in the Air Force Reserve in an inactive duty status.

On 5 February 1993, while serving in the Regular Air Force in the grade of senior airman, applicant's commander considered whether to recommend, under the Uniform Code of Military Justice (UCMJ), nonjudicial punishment for the following misconduct: Applicant

did, on or about 6 January 1993, at or near [REDACTED], violate a lawful general regulation by kissing, making sexual advances toward, and developing a personal relationship with an airman basic, a trainee, at a time when he was a staff member within the same training organization. Applicant indicated he had consulted a lawyer, waived his right to demand trial by court-martial and accept nonjudicial punishment, requested a personal appearance and attached a written presentation. On 16 February 1993 the commander considered the matters presented and found that applicant did commit one or more of the offenses alleged. Applicant appealed the commander's decision and the appeal was denied. Punishment consisted of 30 days correctional custody, reduction to the grade of airman but, that portion of the punishment that exceeds reduction to the grade of airman first class, is suspended until 16 August 1993, after which time it will be remitted without further action unless sooner vacated. Applicant's new date of rank to airman first class was 16 February 1993.

Applicant's EPR profile is as follows:

| <u>PERIOD ENDING</u> | <u>OVERALL EVALUATION</u> |
|----------------------|---------------------------|
| 31 Jan 92 | 5 |
| * 31 Jan 93 | 2 (Referral Report) |
| 31 Jan 94 | 5 |
| 31 Jan 95 | 5 |
| 22 Oct 95 | 5 |
| 22 Oct 96 | 5 |
| 30 Mar 97 | 5 |

* **Contested report**

AIR FORCE EVALUATION:

The Chief, Inquiries/AFBCMR Section, Airman Promotion Branch, HQ AFPC/DPPPWB, states that based on applicant's date of rank for senior airman, the first time the contested report was considered in the promotion process was cycle 95E5 to staff sergeant. Should the Board void the report or upgrade the overall rating, provided he is otherwise eligible, he will be entitled to supplemental promotion consideration beginning with cycle 9535. However, he will not become a selectee during cycles 9535 or 9635, but would become a selectee for the 9735 cycle pending a favorable data verification and the recommendation of the commander. Applicant has a High Year Tenure date of December 1997.

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

The Associate Chief, Military Justice Division, Air Force Legal Services Agency, AFLSA/JAJM, states that the applicant does not

specifically seek relief with regard to the Article 15 action. However, he does state that his decision to accept Article 15 proceedings was the result of unlawful command influence in that his commander gave him the option "to accept a court-martial or taking the Article 15."

Nonjudicial proceedings are permitted under Article 15, UCMJ, and offer commanders the opportunity to dispose of less serious offenses without resorting to trial by court-martial. The decision to offer the accused the opportunity to resolve the matter in the Article 15 forum rests with the commander. Accordingly, the applicant's suggestion that being offered such a choice by his commander in this case amounted to unlawful command influence is without merit. Such a choice is a necessary legal prerequisite to any action under Article 15 UCMJ, and the commander, therefore, was only properly fulfilling the requirements of due process by presenting such an option to the applicant. Since the applicant, after consulting with his attorney, made his own admission the choice most "advantageous" to him and his family, to accept Article 15 action, he cannot successfully challenge the process simply because he disagrees with the result. In conclusion, the applicant's nonjudicial punishment action was properly accomplished and legally sufficient. He was afforded all rights granted by statute and regulation. There are no legal errors requiring corrective action and they recommend the applicant's request be denied.

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

The Chief, Evaluation Procedures Section, HQ AFPC/DPPPEP, states that while the first sergeant's and rater's letters state the rater worked directly for the commander at that time, the indorser does not make the same claim, nor did applicant obtain a letter from the commander stating he, the commander, was the rater's rater. Further, applicant failed to submit any other documentation in support of his claim, such as an official document on his rater (i.e. an appraisal, award recommendation, etc.) covering the close-out of the contested report and signed by the commander in a supervisory capacity, or any type of document from civilian personnel (i.e. a supervisory roster) reflecting the rater's rater as of 31 January 1993.

Although the rater states he was the applicant's immediate supervisor from December 1990 to January 1995, a check of applicant's record shows that he was not the rater reflected on applicant's EPR closing out in January 1992. Further, a review of the EPRs immediately preceding and following the contested EPR shows the applicant's rating chain appears to fluctuate as far as the position of each indorser is concerned. Therefore, AFPC/DPPPEP finds it impossible to conclude without a doubt that the indorser on the contested report is incorrect. After receiving the referral letter (to the EPR in question) and becoming aware of the overall final rating, AFPC/DPPPEP finds it surprising applicant never discussed the EPR with his rater,

which may have identified the alleged error. Applicant's failure to fulfill his own responsibilities clearly contributed to this situation if, indeed, an error was made. A review of the documents provided does not support applicant's allegation of an erroneous evaluator. They recommend applicant's request be denied.

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

The Chief, BCMR and SSB Section, HQ AFPC/DPPPAB, states that HQ AFPC/DPPPEP provided a technical advisory and HQ AFPC/DPPPAB agrees with their assessment and have no additional comments.

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

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

A summary of the copy of the applicant's response, dated 21 October 1997, with attachment, follows. When he addressed the Article 15, it was merely to show that the individual who indorsed his EPR had not even read or seen the Office of Special Investigation (OSI) report and therefore rendered it virtually impossible for him to justify the rating which he had given. At the time of this contested report, his rater's rater had recently been assigned and had not yet assumed those duties. Therefore, his rater's rater would still have been the commander. The indorser has attested to the fact that he never reviewed the OSI report which was the basis for the rating which he gave.

A copy of the applicant's response is attached at Exhibit H.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was not timely filed; however, it is in the interest of justice to excuse the failure to timely file.
3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After a thorough review of the evidence of record and applicant's submission, we are not persuaded that the EPR, closing 31 January 1993, should be declared void or, that he should be reconsidered for promotion to the grade of staff sergeant with all back pay. His contentions are duly noted; however, we do not find these assertions, in and by themselves, sufficiently persuasive to override the rationale provided by the Air Force. We therefore agree with the recommendations of the Air Force and adopt the rationale expressed as the basis for our decision that the

applicant has failed to sustain his burden that he has suffered either an error or an injustice. Therefore, we find no compelling basis to recommend granting the relief sought.

THE BOARD DETERMINES THAT:

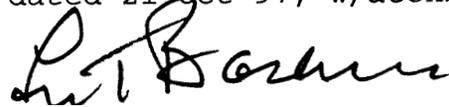
The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence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

The following members of the Board considered this application in Executive Session on 2 June 1998, under the provisions of AFI 36-2603.

Mr. LeRoy T. Baseman, Panel Chair
Mr. Joseph G. Diamond, Member
Ms. Peggy E. Gordon, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 11 Sep 97, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, HQ AFPC/DPPPWB, dated 18 Sep 97.
- Exhibit D. Letter, AFLSA/JAJM, dated 19 Sep 97.
- Exhibit E. Letter, HQ AFPC/DPPPEP, dated 26 Sep 97.
- Exhibit F. Letter, HQ AFPC/DPPPAB, dated 29 Sep 97.
- Exhibit G. Letter, AFBCMR, dated 20 Oct 97.
- Exhibit H. Applicant's Letter, dated 21 Oct 97, w/atchs.



LEROY T. BASEMAN
Panel Chair