RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

[redacted]

DOCKET NUMBER: **97-03471**

COUNSEL: NONE

HEARING DESIRED: NO

FEB 5 1999

APPLICANT REQUESTS THAT:

1. The Letter of Reprimand (LOR), dated 12 December **1997,** and the Unfavorable Information File (UIF), dated 12 December **1997,** be declared void and removed from his records.

2. His promotion to the grade of staff sergeant (E-5), during the **96E5** promotion cycle, be reinstated with the appropriate promotion sequence number of **8478.**

APPLICANT CONTENDS THAT:

On 22 September **1997,** he was found not guilty of Driving Under the Influence (DUI) in Sarpy County, Nebraska. He states that since his Article **15** was subsequently set aside, he is requesting that the Letter of Reprimand and a UIF, that was established when the Article **15** was set aside, be removed from his records.

Applicant's submission with regard to the Article 15 action is attached at **Exhibit A.**

Applicant's submission with regard to the LOR, UIF and promotion issues, is attached at **Exhibit A-1.**

STATEMENT OF FACTS:

Applicant reenlisted in the Regular Air Force on **23** September **1994** for a period of four (4) years.

On 19 May **1997,** the applicant's commander notified him that he was considering whether he (commander) should punish the applicant under Article **15,** Uniform Code **of** Military Justice (UCMJ). The alleged misconduct consisted of: Applicant did, at or near Bellevue, Nebraska, on or about **27** April **1997,** operate a motor vehicle while drunk. On 2 June **1997,** applicant did consult a lawyer, waived his right to court-martial, did make a personal appearance and submitted a written presentation. The commander considered the matters presented in defense, mitigation, or

extenuation, and found that the applicant did commit one or more of the offenses alleged. On 4 June 1997, the commander imposed punishment on the applicant that consisted of 15 days extra duty and forfeiture of $150 pay per month for 2 months (the forfeiture of pay was suspended until 3 December 1997 which would be remitted without further action unless sooner vacated). The applicant acknowledged receipt of the Article 15 action on 4 June 1997. Applicant appealed the Article 15 action on 9 June 1997, however, the appeal was denied.

On 22 May 1997, three days after applicant received notification of the Article 15 action, a criminal complaint was issued against the applicant from the county court of Sarpy County, Nebraska. The complaint included four counts. Count 1: Alleged applicant drove a vehicle under the influence of alcohol on 27 April 1997. Count 2: Alleged applicant drove his vehicle to the left of the center line of the roadway on the same date. Count 3: Alleged that applicant refused to submit to a preliminary breath test in violation of Nebraska law. Count 4: Alleged that applicant refused to submit to a chemical test in violation of Nebraska law. Trial on the charges was held on 22 September 1997. Applicant was found Not Guilty of Counts 1 and 2 and Guilty of Counts 3 and 4. An unspecified sentence was imposed.

On 6 June 1997, applicant's Squadron Commander notified the applicant of his decision to non-recommend the applicant for promotion to the rank of staff sergeant and remove applicant's name from the 9635 promotion list. The reason for this was applicant's recent DWI.

Prior to the drunk driving incident, applicant's Wing Commander had instituted a policy of offering Air Force members nonjudicial punishment for off-base DUIs. The policy apparently grew out of the Air Force's perception that Sarpy County had a practice of offering first time DUI offenders participation in a "diversion" program wherein they could avoid an appearance before a judge and a conviction upon payment of a fee and attending alcohol awareness classes.

The applicant's Area Defense Counsel (ADC) submitted a memorandum on 6 November 1997 on the applicant's behalf, citing an Air Force Legal Services Agency (AFLSA/JAJM) policy letter regarding nonjudicial punishment for off-base DUIs. Their position was that if held accountable by a civilian court and acquitted, then an Article 15 based on the same offense should be set aside.

The Article 15 was set aside, per AF Form 3212, dated 12 December 1997. The applicant received a Letter of Reprimand (LOR), dated 12 December 1997, the same day, for being arrested for DUI and refusing to submit to a breathalyzer test to identify the presence of alcohol in the applicant's system. The applicant's commander established a UIF.

Information in the Personnel Data System (PDS) reflects that applicant had a reenlistment eligibility (RE) code of 1J. This RE code reflects "eligible elects separation or discharge." The PDS also reflects that applicant applied for separation on 27 January 1998.

Applicant was honorably released from active duty on 10 March 1998 under the provisions of AFI 36-3208 (Miscellaneous Reasons/General Reasons) and transferred to the Air Force Reserve with a Reserve Obligation Termination Date of 10 March 1999. He served 6 years, 11 months and 3 days of active military service.

AIR FORCE EVALUATION:

The Associate Chief, Military Justice Division, Air Force Legal Services Agency, AFLSA/JAJM, stated, in summary, that the applicant's contention, regarding the Article 15 action, has merit. The Rule for Courts-Martial 201(d)(3), Manual for Courts-Martial provides, "Although it is constitutionally permissible to try a person by court-martial and by a State court for the same act, as a matter of policy a person who is pending trial or has been tried by a State court should not ordinarily be tried by court-martial for the same act. The AFLSA/JAJM's memoramdum, dated 27 October 1997, expressed its opinion that the same policy considerations apply to actions under Article 15 of the UCMJ. In this case, no policy of the Air Force would be served by allowing the Article 15 to stand as applicant was ultimately tried before a civilian judge on the DUI charge and was, in fact, convicted of two charges that closely relate to the DUI charge. The available records indicate that the State did dispose of the DUI charge on the merits and applicant was made to suffer the consequences of his actions through his convictions on the refusal charges. The Associate Chief in this evaluation concludes that Air Force policy and equity require a removal of the Article 15 from the applicant's records.

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

The Associate Chief, Military Justice Division, AFLSA/JAJM, submitted a supplemental evaluation regarding the Article 15. He states that applicant submits a supplemental request in which he attaches an AF Form 3212 showing the Article 15 was set aside on 12 December 1997. That action also set aside the punishment imposed on 4 June 1997. Therefore, the request for the AFBCMR to set aside the Article 15 punishment is moot. The remaining portion of the applicant's supplemental application pertains to a Letter of Reprimand (LOR) and an Unfavorable Information File (UIF). These are administrative actions outside the purview of the Military Justice Division that can be better addressed by Headquarters Air Force Personnel Center (HQ AFPC).

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

The Chief, Commander's Programs Branch, HQ AFPC/DPSFC, states 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. The LOR is optional for file in the UIF for enlisted personnel.

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, or less than acceptable duty performance. Commanders have the option to remove an enlisted member's UIF early. There is no policy guidance on receiving an LOR for the same (or closely related) offense managed by the civilian court system. Air Force Instruction **36-2907,** which governs UIFs does not prohibit what the applicant appears to view as double jeopardy. They recommend the applicant's request be denied.

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

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Copies of the Air Force evaluations were forwarded to the applicant on 2 March **1998** for review and response within 30 days. 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. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. We have thoroughly reviewed the evidence of record and applicant's submission. His contentions are duly noted; however, we do not find these uncorroborated assertions, in and by themselves, sufficiently persuasive to override the rationale provided by the Air Force. The applicant is requesting that the Letter of Reprimand (LOR) and Unfavorable Information File (UIF), dated 12 December **1997,** be declared void and removed from his records. However, we note that by regulation, at the time an individual separates from the Air Force, LORs and UIFs are removed from the record and destroyed. Therefore, since the LOR and UIF were destroyed when the applicant separated, this is a moot issue.

4. With regard to the promotion issue, we note that the commander's reason for non-recommending the applicant for promotion was because of the DWI and Article 15 action. It appears that when the applicant was acquitted of the DWI charge by the civilian court, a request was made to the commander to set aside the Article 15 action. The commander did subsequently set aside the Article 15 action; however, it appears that he still believed that applicant's conduct was unacceptable and administered an LOR and established the UIF. At the time the applicant's commander set aside the Article 15, the applicant could have submitted additional information or new evidence and requested that his promotion be reinstated. The commander could have then considered reinstatement of the promotion based on applicant's submission of additional information or new evidence. However, we do not find any evidence of record that the applicant made a request for reinstatement or submitted any documentation in support of a promotion reinstatement. 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 5 November 1998, under the provisions of AFI **36-2603.**

Mr. David C. Van Gasbeck, Panel Chair
Mr. Edward H. Parker, Member
Ms. Patricia A. Vestal, Member

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 4 Nov 97, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, AFLSA/JAJM, dated 21 Jan 98.
Exhibit D. Letter, AFLSA/JAJM, dated 9 Feb 98.
Exhibit E. Letter, HQ AFPC/DPSFC, dated 27 Feb 98.
Exhibit F. Letter, AFBCMR, dated 2 Mar 98.

DAVID C. VAN GASBECK
Panel Chair