



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

OCT 23 1998

Office of the Assistant Secretary

AFBCMR 98-00094

MEMORANDUM FOR THE CHIEF OF STAFF

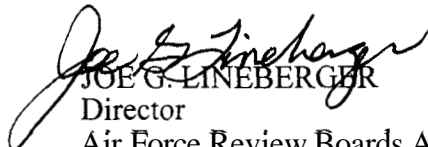
Having received and considered the recommendation of the Air Force Board for Correction of Military Records and under the authority of Section 1552, Title 10, United States Code (70A Stat 116), it is directed that:

The pertinent military records of the Department of the Air Force relating to [REDACTED] be corrected to show that:

a. The Article 15, UCMJ, initiated on 13 September 1996, with punishment imposed on 22 November 1996, be, and hereby is, set aside and removed from his records and all rights, privileges and property of which he may have been deprived be restored.

b. The Company Grade Officer Performance Report (OPR), AF Form 707B, rendered for the period 23 July 1996 through 22 July 1997 be, and hereby is, declared void and removed from his records.

It is further directed that, should he not be selected for promotion to the grade of captain by the Calendar Year 1998D (CY98D) Captain Selection Board, scheduled to convene on 21 September 1998, his records, as amended, be considered by Special Selection Board (SSB) for the CY98D board.


JOE G. LINEBERGER
Director
Air Force Review Boards Agency

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

OCT 28 1998

IN THE MATTER OF:

DOCKET NUMBER: 98-00094

[REDACTED]
COUNSEL: None

[REDACTED]
HEARING DESIRED: Yes

APPLICANT REQUESTS THAT:

The Article 15, dated 22 November 1996, be set aside and removed from his records, including his promotion selection record and an Unfavorable Information File (UIF).

APPLICANT CONTENDS THAT:

He did not commit the offenses alleged in the Article 15. The inconsistencies in the accusers' statements demonstrate they were not credible. The Article 15 specifications were identical in nature and language to the specific reasons listed on the recommendation for "Not Qualified for Promotion (NQP)" to first lieutenant (1Lt) action. The Secretary of the Air Force (SAF) determined, "on the basis of the evidence presented," that he was qualified for promotion. The evidence submitted to the SAF is the same evidence contained in the Article 15. The decision of the SAF sets a great precedence. He has already met a promotion authority on 8 December 1997 with this information in his selection record. To be required to meet a subsequent promotion board with the same prejudicial information would be unjust and possibly suggest double jeopardy.

In support, he provides documents pertaining to the Article 15 proceedings and the NQP action.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

Applicant has 7 years, 1 month and 2 days of enlisted service. He was honorably discharged on 28 December 1992 to enter the officer training program. He is currently serving on extended active duty in the grade of 1Lt (DOR: 11 Jan 97).

During the period in question, applicant was a 2Lt assigned to the [REDACTED] Support Squadron (PTS), Air Intelligence Agency (AIA), at [REDACTED]. The following information was extracted from official documents provided by the applicant and from his military personnel record:

Subsequent to a security police investigation, the applicant was served an Article 15 on 16 September 1996, which consisted of three specifications in violation of Article 134 of the Uniform Code of Military Justice (UCMJ). The first two specifications stemmed from the applicant's alleged adulterous affairs with two different women: an Army NCO and an Air Force civilian. The third specification was for allegedly fraternizing with the Army NCO. The applicant's commander became aware of situation after the Army NCO filed charges that the applicant had assaulted her on 21 July 1996.

On 7 October 1996, after consulting with counsel, applicant waived his rights to a trial by court-martial, accepted nonjudicial punishment proceedings, and acknowledged his rights concerning the nonjudicial punishment proceedings. The applicant appeared before the commander, AIA/CC, and presented written matters. On 13 November 1996, the AIA/CC provided a written summary of the Article 15 presentation to the AIA commander (AIA/CC), who was to determine whether to impose nonjudicial punishment. Applicant's presentation was included.

On 22 November 1996, the AIA/CC imposed punishment consisting of forfeitures of \$1000 pay per month for two months and a reprimand. The applicant appealed this punishment on 2 December 1996. It was determined that the applicant should have been allowed to make his presentation before the AIA/CC since the AIA/CC was reasonably available. As a result, the AIA/CC granted the applicant's request to appeal on 20 December 1996 and scheduled an appointment for the applicant to make his presentation before him on 6 January 1997.

In the interim, on 3 January 1997, applicant was advised that he was recommended for an NQP to 1Lt action. The reasons cited were the same as the Article 15 specifications. Applicant appealed the recommendation on 15 January 1997.

On 17 January 1997, AIA/CC determined that nonjudicial punishment was appropriate and imposed punishment of forfeitures of \$750 pay per month for two months and a reprimand. The AIA/CC also determined that the Article 15 would be placed in applicant's selection records.

On 30 January 1997, applicant requested that the AIA/CC not file the Article 15 in the selection records and presented written matters for consideration. On that same day the applicant also appealed the Article 15 punishment to the Vice Chief of Staff (HQ USAF/CV), the appellate authority.

On 25 February 1997, the applicant was acquitted in a civilian jury trial of the assault charges. The prosecutor provided an affidavit pertaining to this matter.

On 3 March 1997, the applicant provided additional material to the HQ USAF/CV in appeal of the Article 15 punishment. That same day he also appealed to the SAF regarding the NQP action, advising that in February 1997 he had been acquitted by jury of the assault charges filed by the Army NCO.

After reviewing all matters presented in the Article 15 appeal as well as the entire case file, the HQ USAF/CV denied the appeal on 5 March 1997.

On 10 April 1997, the AIA/CC determined that the Article 15 would be filed in applicant's selection records and UIF.

On 14 April 1997, applicant provided additional matters to the SAF regarding the NQP action.

On 17 November 1997, the Air Force Personnel Board (AFPB) considered the NQP action and indicated it had failed to find a preponderance of the evidence supported a determination that the applicant had engaged in either adultery or fraternization. The AFBP recommended against the NQP action. On 8 December 1997, the SAF designee, the Director of Air Force Review Boards Agency, determined that the applicant was qualified for promotion to the Reserve grade of 1Lt.

On 14 January 1998, the Officer Performance Report (OPR) closing 22 July 1997 was referred to the applicant. Three of six Performance Factors in Section V were marked "Does Not Meet Standards" and the rater referred to the contested Article 15 in Section VI. Applicant provided a rebuttal on 23 January 1998, which prompted the report to be rewritten in part and again referred to him on 17 June 1998. Applicant rebutted this version of the OPR on 26 June 1998; however, the additional rater concurred with the marked down performance factors and Article 15 comment and added a comment regarding the Article 15 in Section VII. The OPR was filed in his records on 21 August 1998, and the Personnel Data System was updated in September 1998.

HQ AFPC informally advised the AFBCMR Staff that the applicant is scheduled to be considered for promotion to the grade of captain when the Calendar Year 1998D (CY98D) Captain Selection Board convenes on 21 September 1998.

OER/OPR profile since 1996, follows:

PERIOD ENDING	EVALUATION OF POTENTIAL
12 Feb 96	Meets Standards
22 Jul 96	Meets Standards
22 Jul 97	Referral (Does Not Meet Standards in 3 Performance Factors)

AIR FORCE EVALUATION:

The Associate Chief, Military Justice Division, AFLSA/JAJM, evaluated this case and indicates applicant has provided no additional evidence that was not previously considered during the processing of his Article 15 and subsequent appeals which would indicate an injustice has occurred. Although the applicant may have pointed out some inconsistencies in the two complainants' statements, none of these inconsistencies is relevant to the principal conduct with which the applicant was charged, which is the adultery and fraternization. It is common for individuals to have a faulty memory regarding inconsequential events. He has not provided a logical explanation as to why two separate women, who apparently did not know each other, would come forward and make false allegations against him. His attempts to rationalize as to why they would do this are fairly weak. A set aside is appropriate in the unusual case where there is a question concerning the guilt of the offender or where it is in the best interests of the Air Force to clear the member's record. A set aside is clearly not appropriate in this case. The applicant's case was thoroughly reviewed by two commanders and thoroughly reviewed again on appeal. There is nothing compelling in his responses to the Article 15 or in this application which indicates a clear injustice has been done. The punishment is not disproportionate to the offense committed. Denial is recommended.

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

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant reviewed the evaluation and reaffirms his innocence. He contends that strong credibility issues were ignored, which does not reflect fairness and impartiality. He has provided evidence to prove the [complainants] lied in their sworn statements. To find him guilty based on unproved allegations and without any evidence is an injustice. The burden of proof should be on the accuser. The accusers' sworn statements were the only evidence provided, hence their **word** is what the decision was based on. Contrary to the advisory's suggestion that the inconsistencies are "irrelevant," he contends that while it may have been of no consequence to the complainant to make these allegations, they were detrimental to his career and integrity and should not be dismissed. These inconsistencies go directly to the credibility of the complainants and credibility is crucial since the words of their sworn statements are what the decision was based on. The inconsistencies were due to lies, not faulty memory. He provides further rationale as to why the complainants' statements are not credible. The injustice is clear in that there was a rush to judgment as to his guilt. After reviewing the evidence, the SAF determined he was qualified for promotion. The SAF's decision is final. To leave this information in his

selection record would permit a lower authority promotion board to rule on what the highest Air Force authority has already ruled on, which is a serious breach of the chain of command structure. His application should be approved.

Applicant's complete response, with attachment, is at Exhibit E.

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 to warrant voiding the contested Article 15 in its entirety. Normally we are reluctant to overturn a commander's imposition **of** nonjudicial punishment as he is usually in the best position to assess a member's credibility. Our reluctance is especially keen in this case given the fact that the Vice Chief of Staff was the appellate authority and he undoubtedly carefully considered the entire case file before denying the applicant's appeal. However, based on the lack **of** independent evidence supporting the statements of the applicant's accusers and the inconsistencies contained therein, we feel compelled to resolve any doubt in this applicant's favor. In this regard, the only evidence from independent third parties was provided by the applicant. Further, no sworn statements were taken from witnesses supporting the enlisted female's allegations, and the veracity of many **of** the applicant's claims was not investigated. Nothing other than the female civilian's own statement supports her assertions, yet the applicant has provided persuasive documentation to substantiate his. We note the AFPB found that the preponderance of the evidence **did not** support the NQP action, and the SAF's designee determined that the applicant **was** qualified for promotion. We agree with this determination. The basis for the NQP action was the same as for the Article 15 and, since the preponderance of the evidence did not support the NQP action, we conclude it also does not support the imposition of nonjudicial punishment. Therefore, we recommend that the Article 15 be set aside.
4. Although the applicant neither raised the issue of the referral OPR closing 22 July 1997 nor requested its removal, we note that the report does refer to the Article 15 in question and cites his alleged fraternization and adultery. Since we have concluded the charges which drove the Article 15 are groundless, these same unsubstantiated allegations should not serve as the basis for the referral OPR. Therefore, the report is flawed and inaccurate and, in the interest of justice, should also be removed from the applicant's records.

5. In addition, since the above recommendations come too late to amend applicant's records before the CY98D board convenes on 21 September 1998, we further recommend that, should he not be selected for promotion to captain, his records, as amended, be considered by Special Selection Board (SSB) for the CY98D board.

THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that:

a. The Article 15, UCMJ, initiated on 13 September 1996, with punishment imposed on 22 November 1996, be set aside and removed from his records and all rights, privileges and property of which he may have been deprived be restored.

b. The Company Grade Officer Performance Report (OPR), AF Form 707B, rendered for the period 23 July 1996 through 22 July 1997 be declared void and removed from his records.

It is further recommended that, should he not be selected for promotion to the grade of captain by the Calendar Year 1998D (CY98D) Captain Selection Board, scheduled to convene on 21 September 1998, his records, as amended, be considered by Special Selection Board (SSB) for the CY98D board.

The following members of the Board considered this application in Executive Session on 3 and 15 September 1998, under the provisions of AFI 36-2603:

Mr. Henry C. Saunders, Panel Chair
Mr. Joseph G. Diamond, Member
Ms. Peggy Gordon, Member

All members voted to correct the records, as recommended. The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 7 Jan 98, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFLSA/JAJM, dated 24 Feb 98.
- Exhibit D. Letter, AFBCMR, dated 19 Mar 98.
- Exhibit E. Letter, Applicant, dated Apr 98, w/atch.

HENRY C. SAUNDERS
Panel Chair



DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL SERVICES AGENCY (AFLSA)

24 February 1998

MEMORANDUM FOR AFBCMR

FROM: AFLSA/JAJM (Capt Hogan)
112 Luke Avenue, Room 343
Bolling Air Force Base, DC 20332-8000

SUBJECT: Correction of Military Records of [REDACTED]

Applicant's request: In an application dated 7 January 1998 [REDACTED] the applicant, requests that an Article 15 be set aside and removed from his records to include his Promotion Selection Record and an Unfavorable Information File. The applicant received the Article 15 punishment on 17 January 1997. [REDACTED] appealed the punishment. AF/CV, the appellate authority, denied his appeal on 5 March 1997. This review will address the propriety of the Article 15 nonjudicial punishment proceedings. The applicant is within the three year filing window provided by 10 U.S.C.1552(b).

Facts of military justice action: On 16 September 1996, the applicant was served an Article 15 which consisted of three specifications in violation of Article 134 of the UCMJ. The first two specifications stemmed from the applicant's adulterous affairs with two different women, an Army NCO and an Air Force civilian. The third specification was for fraternizing with the Army NCO. The applicant's commander became aware of these charges after the Army NCO filed assault charges against the applicant, (The applicant was subsequently acquitted of the assault charges in a civilian jury trial). During the course of investigation relating to the assault charges, the Army NCO revealed she and the applicant dated for several months and had sexual relations numerous times during their relationship. During the investigation, a civilian woman came forward and stated she had a sexual relationship with the applicant on numerous occasions. The civilian, a civilian employee at [REDACTED] where the applicant is stationed, stated she stopped the relationship when she learned the applicant was married. The applicant was married in December 1995. His wife lives in [REDACTED]. The applicant had fraternized with the Army NCO between, on or about September 1995 to July 1996. Their adulterous relationship began in early January 1996. The applicant's affair with the AF civilian occurred between May-June 1996.

On 7 October 1996, the applicant acknowledged his rights concerning the nonjudicial punishment proceedings. The applicant consulted a lawyer. The applicant waived his rights to a trial by court-martial and accepted nonjudicial punishment proceedings. The applicant requested to make a private personal appearance before the commander. The applicant provided written matters for the commander's consideration. On 7 October 1996, the applicant made his presentation before [REDACTED] who provided a written summary of the

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presentation on 13 November 1996 to [REDACTED] AIA/CC. [REDACTED] was the commander who was to determine whether or not to impose nonjudicial punishment. On 22 November 1996, [REDACTED] determined nonjudicial punishment was appropriate and imposed a punishment consisting of forfeitures of \$1000.00 pay per month for two months and a reprimand.

The applicant appealed this punishment on 2 December 1996. It was determined that it was error for the applicant not to have been allowed to make his presentation before AIA/CC since AIA/CC was reasonably available. As a result, AIA/CC granted the applicant's appeal on 20 December 1996 and scheduled an appointment for the applicant to make his presentation before him on 6 January 1997. On 17 January 1997, AIA/CC determined nonjudicial punishment was appropriate after considering all the documentary evidence and the applicant's personal presentation before him. The punishment consisted of a reprimand and forfeitures of \$750.00 pay per month for two months. The punishment was imposed on 22 January 1997. The applicant appealed his punishment to HQ USAF/CV, the appellate authority, on 30 January 1997. The applicant submitted matters in writing for the appellate authority to consider. After considering all the matters presented in the appeal as well as the entire case file, HQ USAF/CV denied the appeal on 5 March 1997.

Applicant's contentions: The applicant maintains that he is innocent of all the charges and the specifications which were alleged in the Article 15. Subsequent to his Article 15, the applicant was served a not qualified for promotion to first lieutenant action. The applicant appealed. The Secretary of the Air Force Review Boards Agency declared the applicant qualified to be promoted to first lieutenant on 8 Dec 97. The applicant alleges the same evidence and his response used in the Article 15 proceeding was reviewed by the Board to determine whether he was qualified for promotion. The applicant believes since the same evidence was used when the board decided he was qualified for promotion, that the Article 15 is unjust and should be set aside.

In his response to the nonjudicial punishment proceedings, the applicant alleges that both women who filed a complaint against him were lying. He points several inconsistencies in both complainant's statements. In addition, the applicant submitted a statement from his wife who stated she believes her husband is telling the truth as well as statements from friends and co-workers in support of his good duty performance and his good moral character.

Discussion: The applicant has provided no additional evidence that was not previously considered during the processing of his Article 15 and subsequent appeals which would indicate an injustice has occurred. Although the applicant may have pointed out some inconsistencies in the two complainant's statements, none of these inconsistencies are relevant to the principal conduct with which the applicant was charged which is the adultery and fraternization. It is common for individuals to have a faulty memory regarding relatively nonconsequential events.

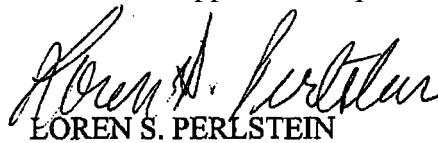
The applicant has not provided a logical explanation as to why two separate women, who apparently do not know each other, would come forward and make false allegations against him. His attempts to rationalize as to why they would do this are fairly weak. He alleges the Army

NCO wanted more of relationship with him than she had. The applicant admits in his Article 15 response to socializing with the Army NCO off-duty. He attended several activities **with** her to include an Army ball and a carnival. The Army NCO knew the applicant well enough to have received his pager number. The applicant knew the Army NCO well enough **that** he asked her to play host to several of his visiting friends from out-of-town since he thought he would be unable to because he thought he had to work. **This** in and of itself **is** sufficient to prove that the applicant fraternized with the Army NCO. The applicant points out several **instances** of conduct **where** the Army NCO behaved irrationally in **front** of **him** and others. **It** can readily be assumed that the basis for her irrationality was the **sexual** relationship she had with the applicant and his indifference towards her.

Prior **to** the commander's findings, the applicant made **two** personal presentations. One before **his** wing commander and one **before** AIA/CC. Both commanders were not convinced of the applicant's version of events. The applicant appealed the nonjudicial punishment action to HQ USAF/CV. The appeal was denied.

The **Manual** for Courts-Martial and AFI 51-202 allows for Article 15 nonjudicial punishment to be set aside on appeal if under all the circumstances, the punishment resulted in a clear injustice. A set aside is appropriate in the **unusual** case where there is a question concerning the guilt of the offender, or where it is in the best interests of the **Air** Force to clear the member's record. **A** set aside is clearly not appropriate in this case. The applicant's case was thoroughly reviewed by two commanders and thoroughly reviewed **again** on appeal. There **is** nothing compelling in the applicant's response to the Article **15** or in **this** application which indicates a clear injustice **has** been done. The punishment is not disproportionate to the offense committed.

Recommendation: After a review of the available records, I conclude there are no legal errors requiring corrective action **regarding** the nonjudicial punishment **and** administrative relief by **this** office is not warranted. Therefore, I recommend that **the** applicant's request be denied.



LOREN S. PERLSTEIN

Associate Chief, Military Justice Division
Air Force Legal Services Agency