RECORD OF PROCEEDINGS

AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: BC-2008-04401

 INDEX CODE: 114.03/126.04/131.05

 XXXXXXX COUNSEL: NONE

 HEARING DESIRED: NO

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APPLICANT REQUESTS THAT:

The nonjudical punishment under Article 15, imposed on 3 Jan 06, be declared void and removed from his records.

His referral Enlisted Performance Report (EPR) rendered for the period 18 Mar 05 through 17 Mar 06 be declared void and removed from his records.

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APPLICANT CONTENDS THAT:

He did not commit the offense indicated in the Article 15, “displaying” pornographic material. He walked into his Deputy Commander’s room while the Deputy Commander and others were viewing a pornographic movie. The next day, he reported the incident to his commander. He and two other noncommissioned officers (NCO) present received Article 15s because they did not leave the room immediately. He later learned the two other NCOs were successful in obtaining relief (removal of Article 15 and referral EPR) through the BCMR process.

In support of his request, the applicant provides a copies of his AF Form 3070, Record of Nonjudicial Punishment Proceedings, dated 17 Dec 05; AF IMT 1168, Statement of Suspect/Witness/ Complainant, dated 12 Dec 05; and the contested EPR.

The applicant’s complete submission, with attachments, is at Exhibit A.

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STATEMENT OF FACTS:

Information extracted from the Military Personnel Data System (MilPDS) indicates the applicant is currently serving on active duty in the grade of master sergeant with an effective date and date of rank of 1 Apr 08. He enlisted in the Regular Air Force on 12 May 95 and has continually served on active duty, entering his most recent enlistment on 25 Jun 08, when he reenlisted for four years. Prior to the events under review, he was progressively promoted to the grade of technical sergeant.

On 17 Dec 05, while deployed to Kuwait, the applicant was notified by his commander of his intent to impose nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) for allegedly viewing a pornographic video in violation of United States Central Command General Order Number 1A, dated 23 Mar 03.

On 20 Dec 05, the applicant acknowledged receipt of the action, waiving his right to a court-martial and accepting nonjudicial punishment proceedings.

On 21 Dec 05, the commander found the member guilty of displaying a pornographic video.

On 31 Dec 05, the applicant’s commander partially granted the applicant’s 29 Dec 05 appeal, mitigating the suspended reduction in grade to staff sergeant to forfeiture of $200.00 pay, while remitting the remaining suspended forfeitures of pay.

Applicant was selected for promotion to master sergeant during cycle 05E7, with a promotion sequence number of 6602.0 which would have incremented on 1 Jun 06.

On 18 Apr 06, the applicant received a referral EPR for the period 18 Mar 05 through 17 Mar 06. The EPR was referred for derogatory comments relative to the aforementioned Article 15.

On 26 Apr 06, the applicant acknowledged receipt and submitted a written response. As a result of the referral EPR, he was rendered ineligible for promotion to master sergeant, costing him his promotion sequence number and rendering him ineligible for promotion consideration during the following cycle (06E7).

The applicant’s Enlisted Performance Report (EPR) profile since 1998 follows:

 PERIOD ENDING OVERALL EVALUATION

 24 Sep 98 5

 1 Sep 99 5

 1 Sep 00 5

 1 Sep 01 5

 1 Sep 02 5

 17 Mar 03 5

 17 Mar 04 5

 17 Mar 05 5

 **\***17 Mar 06 4 (Referral)

 30 Nov 06 5

 1 Jun 07 5

 1 Jun 08 5

**\*** - Contested EPR

On 21 Sep 07 and 17 Apr 08, the Board granted relief to the other two NCOs involved in this incident because their rights were substantially prejudiced in their respective cases.

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AIR FORCE EVALUATION:

AFLOA/JAJM recommends denial, indicating the applicant has not demonstrated error or injustice. The applicant does not question the fairness of the Article 15 process. The applicant was afforded due process, having the opportunity to demand trial by court-martial, present any extenuating or mitigating evidence and/or appeal the findings and punishment to the next level. JAJM notes the imposing commander partially granted the applicant’s appeal and indicates the punishment imposed was not unfairly harsh. It is difficult to judge the credibility of the applicant’s statement without the benefit of any other evidence in the case. Unfortunately, three years after the fact, there is no record of any of the other statements or evidence from the investigation into this offense. The applicant’s assertions are undermined by the fact he has since risen to the rank of master sergeant.

A complete copy of the AFLOA/JAJM evaluation is at Exhibit C.

AFPC/DPSIDEP recommends denial with respect to removal of the referral EPR, indicating there is no evidence of an error or injustice. They contend the EPR accurately reflects the member received an Article 15 because he “viewed” banned material. The EPR is accurate despite the fact the charge in the Article 15 reflects “displayed”. Further, the relief granted in the other two cases was due to extenuating circumstances that do not apply to this case.

A complete copy of the AFPC/DPSIDEP evaluation is at exhibit D.

AFPC/DPSOE recommends denial with respect to the applicant’s red-lined promotion to master sergeant, indicating there is no evidence of an error or injustice. DPSOE defers to the recommendations of DPSIDEP and AFLOA/JAJM regarding the removal of the referral report and the Article 15, but finds the removal of the applicant’s line number and subsequent ineligibility for promotion consideration during the 06E7 promotion cycle were carried out appropriately and in accordance with prescribing directives.

A complete copy of the AFPC/DPSOE evaluation is at Exhibit E.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

A copy of the Air Force evaluation was forwarded to applicant on 26 Jun 09 for review and response. As of this date, no response has been received by this office (Exhibit F).

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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 an injustice warranting corrective action. After a thorough review of the available evidence, including the Board’s favorable consideration of two virtually identical appeals by individuals involved in the same incident for which the applicant received an Article 15, we believe sufficient doubt has been raised regarding the fairness and equity of the imposed punishment. In this respect, we note that in the other cases, the commander substantially prejudiced the rights of two individuals when he changed, by pen and ink, the legally insufficient specification of “viewing” pornography to reflect “displaying” pornography, without the members’ knowledge. The commander made a similar change to the applicant’s specification of “viewing” pornography. It does not appear the applicant’s case has the same extenuating circumstances as the other two; i.e., failure to notify him of the pen and ink changes. However, we do note that after the applicant appealed the imposed punishment, his commander granted his appeal, in part, by mitigating the punishment. In view of the above, and to preclude any possibility of an injustice, we believe any doubt concerning the Article 15 punishment should be resolved in favor of the applicant. Therefore, we believe the Article 15 imposed on 3 Jan 06 should be voided and removed from his records. Furthermore, since it appears the applicant’s referral EPR closing 17 Mar 06, which resulted in his ineligibility for promotion, was based on the Article 15, we also believe the referral OPR should be declared void and removed from his records and he be promoted to the grade of master sergeant, effective and with a date of rank of 1 Jul 06. Accordingly, we recommend his records be corrected to the extent indicated below.

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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 nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), imposed on 3 Jan 06, be declared void and expunged from his records, and all rights, privileges, and property of which he may have been deprived be restored.

 b.  The *Enlisted Performance Report*, AF IMT 910, rendered for the period 18 Mar 05 through 17 Mar 06, be declared void and removed from his records.

 c.  He was promoted to the grade of master sergeant effective and with a date of rank of 1 Jul 06.

It is further recommended that he be provided supplemental consideration for promotion to the grade of senior master sergeant for all appropriate cycles beginning with cycle 08E8.

If AFPC discovers any adverse factors during or subsequent to supplemental consideration that are separate and apart, and unrelated to the issues involved in this application that would have rendered the applicant ineligible for the promotion, such information will be documented and presented to the Board for a final determination on the individual’s qualifications for the promotion.

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The following members of the Board considered AFBCMR Docket Number BC-2008-04401 in Executive Session on 20 Oct 09, under the provisions of AFI 36-2603:

 Ms. Rita S. Looney, Panel Chair

 Ms. Mary Jane Mitchell, Member

 Ms. Glenda H. Scheiner, Member

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

 Exhibit A. DD Form 149, dated 12 Apr 08, with atchs.

 Exhibit B. Applicant's Master Personnel Records.

 Exhibit C. Letter, AFLOA/JAJM, dated 6 May 09.

 Exhibit D. Letter, AFPC/DPSIDEP, dated 5 Jun 09

 Exhibit E. Letter, AFPC/DPSOE, dated 15 Jun 09

 Exhibit F. Letter, SAF/MRBR, dated 26 Jun 09.

 RITA S. LOONEY

 Panel Chair

**DEPARTMENT OF THE AIR FORCE
WASHINGTON DC**



**Office Of The Assistant Secretary**

AFBCMR BC-2008-04401

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 XXXXXXX, XXXXXXX, be corrected to show that:

 a.  The nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), imposed on 3 January 2006, be, and hereby is, declared void and expunged from his records, and all rights, privileges, and property of which he may have been deprived be restored.

 b.  The *Enlisted Performance Report*, AF IMT 910, rendered for the period 18  March 2005 through 17 March 2006, be, and hereby is, declared void and removed from his records.

 c.  He was promoted to the grade of master sergeant effective and with a date of rank of 1 July 2006.

 It is further directed that he be provided supplemental consideration for promotion to the grade of senior master sergeant for all appropriate cycles beginning with cycle 08E8.

 If AFPC discovers any adverse factors during or subsequent to supplemental consideration that are separate and apart, and unrelated to the issues involved in this application that would have rendered the applicant ineligible for the promotion, such information will be documented and presented to the Board for a final determination on the individual’s qualifications for the promotion.

 JOE G. LINEBERGER

 Director

 Air Force Review Boards Agency

This document contains information which must be protected IAW AFI 33-332 and DoD Regulation 5400.11; Privacy Act of 1974 as Amended Applies, and it is For Official Use Only (FOUO).