RECORD OF PROCEEDINGS

AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: BC-2009-03522

 INDEX CODE: 131.01/111.05

 XXXXXXX COUNSEL: NOT INDICATED

 HEARING DESIRED: YES

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APPLICANT REQUESTS THAT:

1.  His Officer Performance Report (OPR) rendered for the period 29 Apr 05 through 28 Mar 06 be replaced or voided and removed from his records.

2.  He be directly promoted to lieutenant colonel (O-5), or his corrected record be considered for promotion to the grade of lieutenant colonel (O-5) by a Special Selection Board (SSB).

3.  He be reimbursed his recouped career bonus.

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APPLICANT CONTENDS THAT:

The contested OPR is unjust. It contains comments about his letter of reprimand (LOR) and Unfavorable Information File (UIF) which were prematurely issued based on incomplete and incorrect information and an inconclusive Air Force Office of Special Investigations (AFOSI) Report of Investigation (ROI) regarding allegations of a fraudulent household goods (HHG) claim. Based on new evidence, the Air Force Legal Operations Agency (AFLOA) reversed all previous payment denials, undermining the basis for the action under review.

In support of his request, the applicant provides copies of the contested OPR, various documents from his military personnel records, documents related to his HHG claim, e-mail traffic related to his Freedom of Information Act (FOIA) request, and an expanded statement.

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 major (O-4), effective and with a date of rank of 1 Jan 04.

The applicant’s OPR profile since 2000 follows:

 PERIOD ENDING OVERALL EVALUATION

 8 Apr 00 Meets Standards

 8 Apr 01 Meets Standards

 8 Apr 02 Meets Standards

 8 Apr 03 Meets Standards

 8 Apr 04 Meets Standards

 8 Apr 05 Meets Standards

 **\*** 28 Mar 06 Meets Standards (Referral)

 28 Mar 07 Meets Standards

 28 Mar 08 Meets Standards

 28 Mar 09 Meets Standards

**\*** Contested Report

On 7 Jul 03, the applicant’s HHG were destroyed in a fire while in transit from Eglin AFB, Florida to his new duty station.

According to the AFOSI ROI, the applicant subsequently submitted a claim with the government for $99,528.00.

On 15 Jun 04, the AFOSI initiated an investigation in response to allegations from a wing staff judge advocate claims officer the applicant had filed a suspicious claim. The investigation was conducted through 9 Feb 06 and the ROI was issued on 15 Feb 06.

On 17 Mar 06, the applicant’s counsel responded to an LOR apparently issued to the applicant, requesting both the LOR and UIF be set aside, indicating the evidence presented failed to reveal any misconduct or unprofessional behavior, but instead revealed a failure on the part of the government to follow proper procedures in adjudicating his claim.

On 7 Apr 06, the contested OPR was referred to the applicant due to the comments in Section VI, *Rater Overall Assessment*, “- Displayed poor judgment & lack of integrity by negligently preparing HHG claim—rec’d LOR for indiscretion.”

On 7 Apr 06, the applicant submitted a six page rebuttal, with attachments, indicating the inconclusive AFOSI report, combined with incomplete information and bias, formed an insufficient basis for his LOR, UIF, referral OPR, and negative promotion recommendation form (PRF).

On 24 Jan 07, according to information provided by the applicant, the Air Force Legal Operations Agency (AFLOA) approved his request for reconsideration of his HHG claim, indicating all items previously denied due to lack of substantiation or proof were approved for payment.

The remaining relevant facts pertaining to this application are contained in the letters prepared by the appropriate offices of the Air Force, which are attached at Exhibits D, E, F, and I.

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AIR FORCE EVALUATION:

AFPC/DPSIMC recommends denial due to lack of evidence. A request was sent to the applicant to provide the LOR in question. To date, the applicant has not provided the LOR. Without it, they are unable to determine if the LOR was not issued in accordance with AFI 36-2907, *Unfavorable Information File (UIF) Program*.

A complete copy of the AFPC/DPSIMC evaluation is at Exhibit D.

AFPC/DPSIDEP recommends denial of the applicant’s request to replace or remove the contested OPR, indicating the evidence does not show a clear error or injustice took place. Although the applicant provided several documents in support of his case, they found no evidence the applicant was exonerated of all or any part of the allegations that led to the LOR or the commander-directed referral OPR.

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

AFPC/DPSOO recommends denial of the applicant’s request for direct promotion or an SSB, relying on the opinions of the other Air Force experts for their recommendation.

A complete copy of the AFPC/DPSOO evaluation is at Exhibit F.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant strongly, yet respectfully, non-concurs with the Air Force evaluations and urges the Board to do the right thing by considering the larger picture in addition to whether or not rules and regulations were followed. In support of his rebuttal, he provides copies of additional documents related to the final adjudication of his HHG claim, including a memorandum from AFLOA, an affidavit, and several supporting statements.

A complete copy of the applicant’s response, with attachments, is at Exhibit H.

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ADDITIONAL AIR FORCE EVALUATION:

AFLOA/AFCSC recommends denial, indicating there is no evidence of an error or injustice. The Air Force eventually paid a total of $40,965.08 of the applicant’s $99,528.00 claim, but only after the applicant provided additional substantiation for some of the items subject to a deferral. The applicant’s argument seems to be that since the Air Force ultimately paid his claim, he did nothing to warrant an LOR or a referral OPR. However, this argument is not sound. First, the applicant’s commander could have found that he committed fraud when he filed his original claim with the Air Force. For example, he misrepresented the purchase dates and value of numerous professional books. He initially valued his loss on the books at $12,000, but when pressed, could only substantiate a current replacement cost of $8,100. It would have been reasonable for the commander to conclude the misrepresentation regarding the books as intentional and material, which supports a finding of fraud and justifies a written reprimand. Any such finding could lead a commander to question a field grade officer’s judgment and integrity. Second, some lesser offense than fraud could have been the basis of the personnel actions taken against the applicant. The commander may have found that certain misrepresentations were not intentional, but merely negligent or culpably inefficient. For example, the commander may have determined the applicant did not intend to value the books at $4,000 more than he could substantiate for a replacement cost. Rather, he may have determined the applicant simply guessed at the value rather than performing the due diligence necessary to determine the accurate value of the books. In which case, he could have found the applicant was negligent and such a finding may have served as a basis for the reprimand or for the mention of negligence in the OPR. Finally, payment of some portion of the claim is irrelevant to a finding of fraud or some lesser offense in this case. Ultimately, the commander had sufficient evidence to reprimand the applicant for either fraudulently making a claim or some lesser dereliction. He had sufficient justification for referring to that reprimand and questioning the applicant’s judgment and integrity in the OPR. He also had sufficient evidence of other negligence in the making of the claim to justify referring to that negligence in the OPR.

A complete copy of the AFLOA/AFCSC evaluation is at Exhibit I.

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APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

A copy of the additional Air Force evaluation was forwarded to the applicant on 27 Oct 10 for review and comment within 30 days. As of this date, no response has been received by this office (Exhibit J).

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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.  Insufficient relevant evidence has been presented to demonstrate the existence of an error or injustice. We took notice of the applicant's complete submission, including his response to the Air Force evaluations, in judging the merits of the case; however, we agree with the opinions and recommendations of the Air Force offices of primary responsibility and adopt their rationale as the basis for our conclusion the applicant has not been the victim of an error or injustice. We note the applicant’s request for reimbursement of his recouped career bonus; however, after a thorough review of the available evidence we are unable to determine the nature of the bonus in question or the basis for its alleged recoupment. Therefore, in the absence of evidence to the contrary, we find no basis to recommend granting the relief sought in this application.

4.  The applicant's case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issues involved. Therefore, the request for a hearing is not favorably considered.

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THE BOARD DETERMINES THAT:

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

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The following members of the Board considered AFBCMR Docket Number BC-2009-03522 in Executive Session on 22 Jul 10 and 14 Dec 10, under the provisions of AFI 36-2603:

 Mr. XXXXXXXXXX, Panel Chair

 Ms. XXXXXXXXXX, Member

 Mr. XXXXXXXXXX, Member

The following documentary evidence pertaining to AFBCMR Docket Number BC-2009-03522 was considered:

 Exhibit A. DD Form 149, dated 22 Sep 09, w/atchs.

 Exhibit B. Applicant's Master Personnel Records.

 Exhibit C. AFOSI Report (withdrawn).

 Exhibit D. Letter, AFPC/DPSIMC, dated 26 Feb 10.

 Exhibit E. Letter, AFPC/DPSIDEP, dated 10 May 10.

 Exhibit F. Letter, AFPC/DPSOO, dated 2 Jun 10.

 Exhibit G. Letter, SAF/MRBR, dated 11 Jun 10.

 Exhibit H. Letter, Applicant, dated 4 Jul 10, w/atchs.

 Exhibit I. Letter, AFLOA/AFCSC, dated 25 Oct 10.

 Exhibit J. Letter, AFBCMR, dated 27 Oct 10.

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 Panel Chair