RECORD OF PROCEEDINGS

AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: BC-2009-04305

XXXXXXX COUNSEL: MR. XXXXXXXXXX

HEARING DESIRED: YES

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APPLICANT REQUESTS THAT:

His 27 Oct 09 Letter of Reprimand (LOR) be removed from his Unfavorable Information File (UIF) and Officer Selection Record (OSR) and any and all adverse information be removed from his records.

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APPLICANT CONTENDS THAT:

Counsel states the applicant has been the victim of both official and unofficial retaliation for the filing of inspector general (IG) reports and his protected criticism of the fighter pilot culture and the F15C leadership community within his command. The LOR and UIF is the most recent form of retaliation.

Counsel contends the LOR/UIF is an unlawful use of a commander’s discretionary authority in an attempt to retaliate against, silence, and discredit the applicant. Counsel states the police report of the arrest presents a number of unanswered questions, and the applicant’s commander made the decision to reprimand him without waiting for the outcome of the court proceedings or any further investigation. In addition, the reprimand was also based on the applicant lying to the Public Affairs (PA) officer, who the commander failed to investigate.

In his 23 Nov 09 IG complaint, the applicant requested an investigation into the events leading up to the LOR/UIF, contending that he was the victim of retaliation for raising issues within his command at the general officer level and for his attempts to redress an academic freedom violation suffered in Air University (AU). He requested immediate removal of the LOR/UIF from his records, as well as supplemental consideration for promotion in the event the matter was not resolved before his in-the-promotion zone consideration. He also requested that appropriate action be taken against his commander, the PA officer he was accused of lying to, and any other official found to have retaliated against him.

By amendment, Counsel notes the citation received by the applicant was dismissed. The prosecutor indicated the charge was dismissed because the arresting officer failed to appear. However, Counsel states this is not true, the officer was present, but the prosecutor wanted to avoid a discovery hearing which would furnish his client with more damaging information regarding the arresting officer. Counsel indicates the applicant intends to file a civil suit against the officer.

In support of his request, the applicant provides a four-page statement of Counsel with six appendices.

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

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STATEMENT OF FACTS:

The applicant is currently serving on active duty in the grade of major (O-4). On 27 Oct 09, he was issued a LOR by his wing commander for unprofessional behavior related to his arrest subsequent to a routine traffic stop. In addition, the LOR cited his false response to a public affairs officer regarding a possible publication in the Air Force Times and whether he had posted information that might be of interest to the Air Force Times on any blog or public web site. The LOR was filed in his UIF in accordance with AFI 36-2907, *Unfavorable Information File (UIF).*

On 10 Nov 09, the applicant’s squadron commander notified him of his intent to file the LOR in his officer selection record (OSR) and of his right to appeal the decision. The applicant failed to submit a written appeal and on 16 Nov 09 the squadron commander directed the LOR be filed in his OSR.

On 23 Nov 09, the applicant filed a complaint with the Secretary of the Air Force IG, citing similar contentions to the matter under review. The complaint was subsequently transferred to the Major Command (MAJCOM) IG on 8 Dec 09 for resolution. On 14 May 10, the MAJCOM/IG notified the applicant they were unable to substantiate his claims. Additionally, they advised that a review by the Department of Defense (DoD) IG Military Reprisal Investigations Office failed to substantiate his claims. Therefore, further investigation into his complaint was not warranted. The applicant was advised of his right to appeal to the DoD IG.

The applicant was considered and not selected for promotion by the Calendar Year 2010A (CY10A) Lieutenant Colonel Central Selection Board (CSB), which convened on 8 March 2010.

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 C, D, E, and F.

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AIR FORCE EVALUATION:

AFPC/DPSIMC recommends denial of the applicant’s request to remove the LOR from his UIF. The record shows that the LOR was filed in accordance with AFI 36-2907 and all administrative actions were properly documented.

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

AFPC/PB recommends denial of the applicant’s request to remove the LOR from his OSR. The LOR was properly evaluated for file by the senior rater and all procedures were properly followed. Additionally, the record does not reflect the applicant petitioned his senior rater to remove the LOR in light of the information that the traffic ticket was dismissed and that the arresting officer had been suspended for a lack of truthfulness, although not specifically related to the applicant’s incident.

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

HQ AFPC/DPSOO recommends denial of the applicant’s request for an SSB. Based on the recommendations of AFPC/DPSIMC and AFPC/PB, they find no basis to recommend granting the requested relief.

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

HQ AFPC/JA recommends denial. The applicant claims the LOR rendered him the victim of retaliation for the filing of IG reports and his protected criticism of the fighter pilot culture and F-15C leadership community within his assigned MAJCOM. He also alleges that the information relied upon for the LOR is unreliable and the statements of the primary witnesses are untruthful. However, he has not presented evidence to support his claim of unlawful retaliation. Rather he relies on the coincidence of timing of the alleged misconduct and his complaints (IG and otherwise) directed at the MAJCOM. The juxtaposition of events does not establish that the LOR was motivated by a desire to retaliate against the applicant. He suggests that both witnesses in his case lied with respect to the behavior cited in the LOR. However, other than his own self-serving statements, he has offered no evidence to refute the events in question. Finally, while the preponderance of the evidence supports the offense described in the LOR, the decision whether to take that action (or some greater or lesser action) belongs to the commander. Likewise, the discretion as to whether the LOR should be filed in the officer’s selection record belongs to the command chain.

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

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Copies of the Air Force evaluations were forwarded to the applicant on 1 Oct 10 for review and comment within 30 days. As of this date, no response has been received by this office (Exhibit G).

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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. The applicant contends his commander abused his discretionary authority when he issued the contested LOR and filed it in his UIF and OSR without fully investigating the circumstances surrounding his arrest, which was incident to a minor traffic violation, and his alleged false response to public affairs officials related to a potential Air Force Times story. The applicant cites the ultimate dismissal of the charges stemming from his arrest as proof the commander’s actions were premature. Furthermore, he contends the allegations related to his interaction with public affairs officials are false and offers his own version of events as proof the allegations are unjustified. After a thorough review of the evidence of record and the applicant's complete submission, we do not find his assertions and the documentation submitted in support of his appeal sufficient to persuade us that corrective action is warranted. In this respect, we note that even though the charges in the civil case were dismissed, the applicant has presented no evidence, other than his own assertions, that his misconduct which precipitated the arrest did not form an appropriate basis for the contested LOR. Additionally, while the facts regarding his interaction with public affairs officials are apparently in dispute, we presume the commander acted in good faith and used his knowledge of events and circumstances at the time in exercising his discretionary authority. Absent a strong showing of abuse of that authority, we choose not to substitute our judgment for that of officials who were closer to the events in question. Therefore, absent evidence to the contrary, we find no basis to recommend the relief sought in this application.

4. The applicant alleges he has been the victim of reprisal and has not been afforded full protection under the Whistleblower Protection Act (10 USC 1034). We note the Inspector General investigated these allegations and concluded the commander was within his rights to issue the LOR and file it in the applicant’s UIF and OSR. Based upon our own independent review, we have determined the applicant has not established the LOR, UIF, or OSR actions were motivated by retaliation for making protected communications. In reaching this determination, we note he has submitted no direct evidence of this reprisal motive, and we believe the actions taken were a reasonable response to his misconduct. Therefore, absent evidence to the contrary, we find no basis exists upon which to recommend granting the relief sought in this application.

5. 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-2009-04305 in Executive Session on 16 Nov 10, under the provisions of AFI 36-2603:

Mr. XXXXXXXXXX, Panel Chair

Mr. XXXXXXXXXX, Member

Mr. XXXXXXXXXX, Member

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 24 Nov 09, w/atchs.

Exhibit B. Applicant's Master Personnel Records.

Exhibit C. Letter, AFPC/DPSIMC, dated 19 May 10.

Exhibit D. Letter, AFPC/PB, dated 26 Aug 10, w/atch.

Exhibit E. Letter, AFPC/DPSOO, dated 2 Sep 10.

Exhibit F. Letter, AFPC/JA, dated 23 Sep 10.

Exhibit G. Letter, SAF/MRBR, dated 1 Oct 10.

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Panel Chair