

RECORD OF PROCEEDINGS  
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: BC-2011-05044

COUNSEL:

HEARING DESIRED: YES

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APPLICANT REQUESTS THAT:

1. The Article 15 she received on 5 April 2007 be removed from her records.
2. She be reinstated to the rank/grade of master sergeant.
3. She be allowed to reenter the Reserve for the purpose of finishing her final four years of satisfactory service in order to qualify for reserve retirement at age 60.

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APPLICANT CONTENDS THAT:

The Article 15 she received was in retaliation for allegations that she and several other co-workers were harassed by two senior non-commissioned officers while deployed from their Reserve unit to Balad, Iraq. The allegations were investigated by a Commander Directed Investigation (CDI) and were found to be substantiated.

The first allegation of the Article 15 is that she failed to obey an order, violating Article 92 of the Uniform Code of Military Justice (UCMJ) by wrongfully allowing a male into her sleeping quarters. The remaining two offenses alleged sexual intercourse with three male military members was lined-out of the Article 15 by the issuing commander as not being substantiated. However, in the Reprimand portion of the Article 15, the issuing commander left in the following statement "You willfully disobeyed General Order Number 1A by allowing a member of the opposite gender to enter your sleeping quarters and committing the act of adultery. She should not be reprimanded for the commission of adultery when all of the allegations concerning sexual intercourse were stricken from the Article 15.

The issuing commander felt the only remaining allegation on the Article 15, i.e., violation of Article 92 was substantiated. However, she denies this allegation and cites the official statement of her roommate, dated 29 March 2007, who described the incident in question: *"The Applicant came back to our pod with a gentleman who entered the room along with her and briefly set some*

*bags on her bed for her and immediately turned and left the room."* The applicant states her military records contain no prior adverse actions of any kind; that she received awards and rapid promotions; and to be punished because of the allegation that someone put laundry bags in her room first is unjust and second, even if true, the delivery of bags does not rise to the level of a visitation and therefore the punishment she received is unjustified.

She further states the counsel assigned to her during the time in question was stationed in Europe and was not readily available for discussions related to her case.

In support of the appeal, the applicant provides a personal statement; copies of the official statements used during the Article 15 process; letters from the three members listed in the Article 15, AF Form 3070, *Record of Nonjudicial Punishment Proceedings*; and Office of the Legislative Liaison correspondence.

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

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STATEMENT OF FACTS:

The applicant served in the Air Force Reserves in the grade of master sergeant (E-7) during the matter under review.

During a mobilization tour of duty to Balad Air Base (AB), Iraq between 9 January and 17 May 2007, the applicant made official allegations against two senior NCO's for sexually harassing her and several other female co-workers. While a CDI was initiated and found the allegations of sexual harassment substantiated, the two offending NCO's had already rotated back to their home unit before the CDI was completed. The results of the CDI were forwarded to their home unit along with recommendations for discipline from the initiating commander to each individual's Reserve commander.

The applicant's complaint the CDI and subsequent findings led to her receipt of the Article 15 in question, as retaliation for her actions, was noted as being items pertaining to Headquarters Air Force Reserve Command (AFRC) resources and was accordingly sent to the AFRC Inspector General (IG) for evaluation. The AFRC/IG reviewed the complaint to determine whether or not it fell within the scope of their program and whether or not an investigation of her allegations of mistreatment and false accusations against her were substantiated.

There is no further information, either in her records or in her application, as to the findings of the AFRC/IG; additionally, according to SAF/IG, there is no record of any further investigation.

While still on the deployment to Iraq, her roommate and another female airman accused her of having improper sexual relationships with several different men. Both provided sworn statements to that effect with one statement accusing the applicant of actually engaging in sexual intercourse with the three named male individuals in her living quarters. The applicant's roommate was one of the female victims of the substantiated harassment that the applicant took upon herself as a senior NCO to report.

These accusations led to the applicant being offered nonjudicial punishment under Article 15, UCMJ. After consulting counsel, she accepted the Article 15 and waived her right to demand trial by court-martial. She presented written statements in her own behalf and made a personal appearance before the commander.

The Article 15 contained one violation of Article 92, UCMJ and three violations of Article 134, UCMJ:

1. She disobeyed an order violating the UCMJ, Article 92, by wrongfully allowing visitation of a member of the opposite gender into her sleeping quarters.

2. In violation of UCMJ, Article 134, she, between on or about 12 January 2007 and on or about 31 March 2007, did wrongfully have sexual intercourse with three different men who were not her husband.

On 7 April 2007, the commander determined the evidence did not support the three violations of Article 134 and lined out those allegations. The commander however, did find the violation of Article 92 as substantiated. The commander imposed punishment consisting of a reduction to the grade of TSgt effective with a new DOR of 7 April 2007, forfeiture of \$500 pay and a reprimand. The applicant appealed the decision and on 14 April 2007, the appellate authority denied her appeal.

The applicant was removed from her tour early and was demobilized on 17 May 2007. She continued to serve with the AFR until she voluntarily transferred to the Wisconsin Air National Guard (WIANG), date unknown. She served with the WIANG in the grade of technical sergeant until she applied for and was granted an early termination of her enlistment due to a dependent hardship related to the needs of a disabled child.

On 26 March 2010, she was honorably discharged from the WIANG.

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AIR FORCE EVALUATION:

AFLOA/JAJM recommends a partial grant since the issuing commander found sufficient evidence did not exist to substantiate the three alleged violations of Article 134, UCMJ. As such, they recommend removing any mention of sexual impropriety or adultery.

That said, JAJM recommends denying her request to set aside the Article 15 as the set aside action is actually the removal of the punishment which essentially restores the member to the position held before the imposition of the punishment, as if the action had never been initiated. A set aside should not be routinely granted. Rather, set aside is to be used strictly in the rare and unusual case where a genuine question about the service member's guilt arises or where the best interests of the Air Force would be served.

The applicant does not make a compelling argument that the Board should overturn the commander's original, nonjudicial punishment decision on the basis of injustice. In finding that the applicant did violate Article 92 of the UCMJ, the fact the commander determined the applicant did not commit the alleged offenses of adultery shows that he gave careful and thoughtful consideration to the evidence presented to include his finding she violated Article 92.

While she alleges procedural errors regarding the Article 15 action, her rights were observed throughout the process as she was provided legal counsel (despite her allegations she was not adequately represented), she was afforded and took advantage of her rights to submit statements and appear before the commander, as well as the opportunity to reject the Article 15 and demand trial by court-martial.

Finally, the commander's ultimate decision on the Article 15 action is firmly based on the evidence of the case and the punishment decision was well within the limits of his authority and discretion. Therefore, only that portion of the reprimand the consisting of the language "and committing the act of adultery" should be removed from the Article 15.

The complete JAJM evaluation is at Exhibit C.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Counsel for the applicant responded to the JAJM opinion with a multi-page statement with a statement from the applicant attached. Counsel agrees that any mention of adultery on the Article 15 should be removed due to the issuing commander's finding of insufficient evidence to support violations of Article 134.

With regard to the violation of Article 92, counsel invites the Board to consider the applicant's statement that no man entered her quarters. Further, the applicant provides an amended statement from one of the alleged men clarifying that he never entered her living quarters. Counsel further states for the sake of argument that if a man had entered her room to deposit a bag that such an action does not give rise to actual "visitation" as is defined in the Cambridge Dictionary/American English Version. Additionally, Counsel notes that the JAJM opinion did not address

the situation regarding the Article 15 in light of its issuance under the auspices of the sexual harassment claim made by the applicant early in the deployment.

The applicant's complete response, with attachments, is at Exhibit E.

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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 not timely filed; however, it is in the interest of justice to excuse the failure to timely file.

3. Insufficient relevant evidence has been presented to demonstrate the existence of an error or injustice regarding her request to remove the Article 15 from her records, reinstatement of her former rank of master sergeant, and to allow her to reenter the Reserve to complete her final four years of satisfactory service. We took careful notice of the applicant's complete submission in judging the merits of the case; however, we agree with the opinion and recommendation of the Air Force office of primary responsibility and adopt its rationale as the basis for our conclusion that the applicant has not been the victim of an error or injustice. The applicant's contentions are duly noted; however, we do not find these assertions, in and by themselves, sufficiently persuasive to override the evidence of record or the rationale provided by the Air Force Legal Operations Agency. We are not persuaded by the evidence that the actions taken by her commander were beyond his scope of authority, inappropriate, or arbitrary and capricious. We note that while deployed to Balad Air Base, Iraq the applicant made official allegations against two senior NCO's for sexual harassment. While the Commander Directed Investigation found the allegations of sexual harassment substantiated, the applicant's Article 15 stemmed from the accusations made by her roommate and another female airman who accused her of engaging in sexual intercourse with the three named male individuals in her living quarters. The applicant states the Article 15 was in retaliation for her allegations of sexual harassment by two senior NCO's; however, we find no correlation with the Article 15 action. Notwithstanding the applicant's view, we find insufficient evidence the applicant was denied any rights entitled to under the Article 15 process, to include her right to demand trial by court-martial, which would have required a higher legal standard for her conviction. By accepting the Article 15 forum, the applicant entrusted to her commander the responsibility to decide if she had committed the alleged offense. We do not find the commander's actions holding her accountable for her misconduct to be unreasonable. Therefore we do not find a basis to recommend granting the relief sought and must recommend that all requests, with the exception of the

administrative removal of the words "and committing the act of adultery" on the reprimand portion of the Article 15 be denied.

4. The applicant alleges that she has been the victim of reprisal and has not been afforded full protection under the Whistleblower Protection Act (10 USC 1034). By policy, reprisal complaints must be filed within 60 days of the alleged incident or discovery to facilitate the IG's investigation. We note, as stated above, a CDI was initiated to investigate the sexual harassment complaint; however, the available record does not substantiate that any of the complaints filed alleged reprisal and it appears no investigation was done. Nevertheless, we reviewed the evidence of record to reach our own independent determination of whether reprisal occurred. Based on our review, we do not conclude the applicant has been the victim of reprisal. The applicant has not established that the Article 15 or other actions were rendered in retaliation to making a protected communication. Additionally, based on the evidence of record, it is clear the Article 15 action would have occurred, based on her actions, whether or not she made the protected communication. Therefore, it is our determination the applicant has not been the victim of reprisal based on the evidence of record in this case.

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 issue(s) involved. Therefore, the request for a hearing is not favorably considered.

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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 the non-judicial punishment imposed on 7 April 2007, under the provisions of Article 15, Uniform Code of Military Justice, reprimand portion, be amended by deleting the words "and committing the act of adultery."

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The following members of the Board considered AFBCMR Docket Number BC-2011-05044 in Executive Session on 16 October 2012, under the provisions of AFI 36-2603:

Panel Chair  
Member  
Member

All members voted to correct the records, as recommended. The following documentary evidence pertaining to BCMR Docket Number BC-2011-05044 was considered:

- Exhibit A. DD Form 149, dated 2 Nov 11, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFLOA/JAJM, dated 8 Feb 12.
- Exhibit D. Letter, SAF/MRBR, dated 19 Mar 12.
- Exhibit E. Letter, Counsel, dated 14 Apr 12, w/atchs.

Panel Chair