

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 96-00869

COUNSEL: NONE

HEARING DESIRED: NO

16 OCT 1998

APPLICANT REQUESTS THAT:

The Article 15, dated 8 November 1995, be set aside and that he be reimbursed \$1,800.00 in pay forfeitures.

APPLICANT CONTENDS THAT:

He was falsely accused of Uniform Code of Military Justice (UCMJ) violations and was punished, which was a blatant miscarriage of justice. While he admits to lying to his supervisor, Lt Colonel R---, he contends it was his word against Airman K--- A--- (hereinafter referred to as "the subordinate"), regarding the maltreatment charge and that the subordinate was lying. Regarding the lie to his supervisor, he made an error in judgment while his supervisor interrogated him under hostile conditions without affording him his rights under Article 31, UCMJ. Applicant also contends that the commander ignored the advice of a Board Certified Psychiatrist regarding the subordinate's mental status and diagnosed her independently. The commander denied him the opportunity to have an individual present at his personal appearance before the commander.

Applicant's submission is attached at Exhibit A.

STATEMENT OF FACTS:

Applicant was appointed a second lieutenant, Bio-Medical Science Corps, in the Reserve of the Air Force on 15 August 1994. He was ordered to active duty on 25 October 1994.

On 20 October 1995, applicant was notified of his commander's intent to initiate nonjudicial punishment action against him. Applicant was charged with misconduct in violation of:

Article 93, UCMJ, in that you did, on divers occasions between about 24 July 1995 and 18 September 1995, at or near [REDACTED] AFB, [REDACTED], maltreat Senior Airman K--- A---, a person subject to your orders, by making deliberate and repeated

offensive comments of a sexual nature. On one occasion you told Senior Airman A---, a patient of yours, that you had gone to bed thinking about her and had a dream about her in the middle of the night. Once you called her at her office and asked her to go to lunch with you. On yet a different occasion you called her at her office and asked her how she could pay for your services if she did not have any money to do so. On a separate occasion you asked Senior Airman A--- to come to your office on Saturday, 26 August 1995, to sign a document. When she arrived, you told her she looked and smelled nice, asked her to turn around so you could look at her, asked her what she was going to do sexually for the next six months while waiting for her divorce to be finalized, asked her if she had a man lined up, then told her she was an attractive woman and asked her what she thought about you, and you finally asked her if she had seen a movie where a patient falls in love with her therapist. After Senior Airman A--- left your office, you telephoned her at her home.

Article 107: You did, on or about 22 September 1995, at or near [REDACTED] AFB, [REDACTED] with intent to deceive, make to Lt Colonel R--- an official statement, to wit: that you had not called Senior Airman A--- at home on Saturday, 26 August 1995 and that your meeting with her on that date had lasted only two to three minutes, which statement was totally false, and was then known by you to be so false.

Applicant consulted a lawyer, waived his right to court-martial and accepted nonjudicial proceedings under Article 15. Applicant submitted written material and also made a personal appearance before the commander. On 8 November 1995, the commander imposed nonjudicial punishment consisting of a written reprimand and forfeiture of \$900.00 pay per month for two months. The Article 15 action was filed in the applicant's Officer Selection Record and Command Selection Record. On 14 November 1995 applicant appealed the action and the appeal was denied on 30 November 1995. The record was found legally sufficient on 21 December 1995.

On 4 January 1996, applicant was notified by his commander that involuntary separation action was being initiated against him based upon his serious and recurring misconduct punishable by military or civilian authorities. Specifically, [the Article 15 applicant received on 8 November 1995]. The commander advised the least favorable character of discharge was under other than honorable conditions. Applicant, on 12 January 1996, indicated he did consult with counsel and that he fully understood his rights and options regarding this action.

On 4 January 1996, the [REDACTED] Bomb Wing Acting Staff Judge Advocate, stated that the evidence presented by applicant's commander was legally sufficient to support the administrative separation of applicant.

On 12 January 1996, applicant voluntarily tendered his resignation from the U. S. Air Force under AFI 36-3207. He stated he was voluntarily resigning instead of undergoing further action under AFI 36-3206 because he believed it was in his best interest. On 9 February 1996, the Headquarters Air Combat Command Staff Judge Advocate found the case legally sufficient.

Applicant's request for resignation in lieu of separation action was processed to the Secretary of the Air Force Personnel Council (SAFPC) and on 20 May 1996, the Secretary of the Air Force accepted the applicant's resignation and directed that he be issued an under honorable conditions (general) discharge from all appointments held in the U. S. Air Force.

Applicant was discharged on 7 June 1996 under the provisions of AFI 36-3207, (Misconduct - Resignation Prior to Being Required to Show Cause for Retention on Active Duty, Commission of a Serious Military or Civilian Offense) with a general under honorable conditions discharge in the grade of first lieutenant. He served 1 year, 7 months and 13 days of active military service.

AIR FORCE EVALUATION:

The Associate Chief, Military Justice Division, Air Force Legal Services Agency, AFLSA/JAJM, states that Article 31(b), UCMJ states in pertinent part: "No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement ...and that any statement made by him may be used as evidence against him." The sworn statement of Lt Colonel R---, which the applicant attached to his presentation, reflects that while her initial response was to "investigate," she later recanted that statement and said "No, I really think that it would be more appropriate if we got (the applicant and the subordinate) together with (the subordinate's supervisor) in a room. We did not read anybody their rights because this was a fact finding mission. We had determined that if we could settle it at our level, we would. That is what the IG would want us to do, before any kind of investigation took place, to settle it at our level." Thus, during this meeting, the applicant was not "an accused or a person suspected of an offense," and there was no requirement to advise the applicant of his rights under Article 31.

During the meeting, Major E--- (Chief, Mental Health Services), suggested that Lt Colonel R--- contact the Communications Squadron to see if they had a record of the phone calls. The applicant had no reaction to the suggestion. After the meeting, Lt Colonel R--- contacted the Communications Squadron to find out if any phone calls were made from the applicant's extensions on 26 August 1995. When the Communications Squadron phoned her back

to confirm that two calls had been made on that day from the applicant's extensions to the subordinate, Lt Colonel R--- stated "that to me confirmed about 50% of the subordinate's story right there." She and Major E--- then called the applicant back into her office and "confronted him with the numbers and he said that he had lied because he didn't think I could find that information out." Lt Colonel R--- stated that she kept thinking to herself, "What else did you lie about?" The only thing I know is that with those phone calls, I just substantiated 50% of the subordinate's story. What makes me want to believe that the first 50% wasn't true as well."

The applicant then became a suspect and was advised of his rights and was represented by legal counsel before being questioned.

The applicant states in his application that B/Gen Y--- denied him the opportunity to have an individual present at his Article 15 presentation. MCM Part V, 4C(1) (B) provides that the service member is entitled to "be accompanied by a spokesperson provided or arranged for by the member unless the punishment to be imposed will not exceed extra duty for 14 days, restriction for 14 days, an oral reprimand." However, there is no evidence that the applicant requested to have anyone present during the presentation. According to the Barksdale Legal Office, the applicant did bring his wife to the oral presentation but B/Gen Y--- requested that she not attend the presentation due to the sensitive nature of the subject matter. However, prior to the applicant's oral presentation, a representative from the legal office witnessed a conversation between the applicant's immediate supervisor, Major E--- and B/Gen Y---, wherein Major E--- "spoke in general terms that the applicant was a good guy." Based upon these facts, they see no error in the procedures utilized in this case.

There is no evidence that the commander and the appellate authority were anything but neutral and objective. It is the commander's discretion to determine if an offense was committed. While it is impossible to ascertain all matters considered by the commander or the weight and merit he gave to the matters before him it is clear that the basic elements of the offense are supported by the facts and applicant's actions were in violation of Articles 93 and 107, UCMJ. Clearly, the applicant acted inappropriately. He exercised poor judgment being in the office alone with a client on a weekend. He was also less than forthright when he lied to a superior about calling his subordinate client at her home and about meeting with her on the weekend for only two to three minutes. The commander had sufficient facts before him to prove applicant's misconduct. The appellate authority agreed. Neither was involved in the investigative process. The punishment was appropriate to the offense, and was neither overly harsh nor unreasonable. The Article 15 is legally sufficient. There are no legal errors requiring corrective action. The relief requested should be denied.

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

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Applicant states, in part, that during review of his case, the Air Force evaluation completely ignored the fact that the subordinate and her spouse were mental health patients, with a documented history of similar accusations against others in their unit, including their squadron commander. They also chose to ignore his (applicant's) track record and the fact that the subordinate continued to seek his services exclusively for nearly two months after services were allegedly out of order. There were a few other facts missing, including the subordinate's letter indicating that services were always professional, and that she was completely "comfortable with him as the provider." The appointed chief investigating officer interviewed all parties, and concluded that "there was just nothing there."

Applicant's response is attached at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION:

The Personnel Management Specialist, Separations Branch, HQ AFPC/DPPRP, states that the case has been reviewed for separation processing and there are no errors or irregularities causing an injustice to the applicant. The discharge narrative reason of misconduct complies with AFI 36-3207. Applicant did not identify any specific errors in the discharge process nor provide facts which warrant a change in his reason for discharge.

A copy of the additional Air Force evaluation is attached Exhibit F.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

A copy of the additional Air Force evaluation was forwarded to the applicant on 22 June 1998 for review and response within 30 days. As of this date, no response has been received by this office.

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 probable error or injustice. After a thorough review of the evidence of record and applicant's submission, we are not persuaded that the Article 15, dated 8 November 1995, should be set aside and that he be reimbursed \$1,800.00 in pay forfeitures. His contentions are duly noted; however, we do not find these assertions, in and by themselves, sufficiently persuasive to override the rationale provided by the Air Force. Applicant's initial contention, and the statement in his rebuttal referring to the "subordinate" and her spouse's mental health status, were also noted. Applicant stated that they had a documented history of similar accusations against others in their unit, including the Squadron Commander. In our view, it would appear that if the applicant had knowledge of the subordinate's similar accusations against others, he (applicant), in his professional capacity, would have requested that the subordinate be seen by someone other than himself to prevent him from being placed in that same position. We therefore agree with the recommendations of the Air Force and conclude that the applicant has failed to sustain his burden that he has suffered either an error or an injustice. Therefore, we find no compelling basis to recommend granting the relief sought.

THE BOARD DETERMINES THAT:

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

The following members of the Board considered this application in Executive Session on 25 August 1998, under the provisions of AFI 36-2603.

Mrs. Barbara A. Westgate, Panel Chair
Ms. Olga M. Crerar, Member
Ms. Patricia D. Vestal, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 22 Mar 96, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFLSA/JAJM, dated 14 Jun 96.
- Exhibit D. Letter, AFBCMR, dated 8 Jul 96.
- Exhibit E. Applicant's Letter, undated.
- Exhibit F. Letter, HQ AFPC/DPPRP, dated 4 Jun 98.
- Exhibit G. Letter, AFBCMR, dated 22 Jun 98.



BARBARA A. WESTGATE
Panel Chair



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE PERSONNEL CENTER
RANDOLPH AIR FORCE BASE TEXAS

JUN 04 1998

MEMORANDUM FOR AFBCMR

FROM: HQ AFPC/DPPRP
550 C Street West Ste 11
Randolph AFB TX 78150-4713

SUBJECT: Application for Correction of Military Records [REDACTED]

The applicant, while serving in the grade of first lieutenant, was separated from the Air Force 07 Jun 96 under the provisions of AFI 36-3207 (Misconduct) with a general (under honorable conditions) discharge. He served 01 year 07 months and 13 days total active service.

Requested Action. The applicant is requesting return of the \$1,800 fine he paid as a result of nonjudicial punishment. He further request the nonjudicial punishment be overturned.

Basis for Request. Applicant claims he requested permission to resign his commission after being falsely accused of UCMJ violation. He states his application is being submitted to rectify a gross injustice served by the Air Force. Applicant has indicated that he does not desire reinstatement in the Air Force. This advisory will address only the discharge processing in the case.

Facts. Applicant was notified by his commander on 4 Jan 96, that involuntary separation action had been initiated against him based upon his serious and recurring misconduct punishable by military or civilian authorities. Specifically, applicant had been found guilty of maltreatment of a subordinate who was his patient, by making repeated offensive comments of a sexual nature. In addition, that he also made a false official statement to his commander. For these actions, he received nonjudicial punishment on 8 Nov 95. The commander advised the least favorable character of discharge that the Secretary of the Air Force may approved in his discharge case was under other than honorable conditions. Applicant was advised an Area Defense Counsel had been appointed for him who would discuss the procedures involved and his rights and options. Applicant was also advised he had the right to submit a statement of whether he wanted to comment or submit documentary evidence that he wanted considered in evaluating his case. On 12 Jan 96, applicant voluntarily submitted a letter requesting resignation instead of undergoing further separation action because he believed it to be in his best interest. In an attachment to the letter he submitted, he claimed that he was convicted and punished for a crime that he absolutely did not commit. The case was reviewed by major command legal and was found to be legally sufficient to continued processing for final action. His request for resignation in lieu of separation action was processed to the Secretary of the Air Force Personnel Council (SAFPC) and on 20 May 96, the Secretary of the Air Force accepted the applicant's resignation and directed that he be issued an under honorable conditions (general) discharge from all appointments held in the United States Air Force.

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Discussion. This case has been reviewed for separation processing and there are no errors or irregularities causing an injustice to the applicant. The discharge narrative reason of misconduct complies with **AFI 36-3207** and the type of separation is according to the directives in effect at the time of his discharge. The records indicate member's military service was reviewed and appropriate action was taken.

Recommendation. Applicant did not identify any specific errors in the discharge processing nor provide facts which warrant a change in his reason for discharge. He has filed a timely request.



JOHN C. WOOTEN DAF
Personnel Management Spcl
Separations Branch
Dir of Personnel Program Management

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

14 JUN 996

MEMORANDUM FOR AFBCMR

FROM: AFLSA/JAJM (Major Miller)
112 Luke Avenue, Room 343
Bolling AFB, DC 20332-8000

SUBJECT: Correction of Military Records of [REDACTED]

Applicant's Request: In an application dated 22 March 1996, the applicant requests that the Article 15, UCMJ, nonjudicial punishment he received on 8 November 1995 be set aside. The applicant also asked that he be reimbursed \$1,800.00 in pay forfeitures. The applicant was on active duty in excess leave status at the time he filed his application. The application has been timely filed pursuant to 10 USC 1552(b) and *Detwiler v. Pena*.

Facts of Military Justice Action: This case came to light during [REDACTED] Article 15 presentation. [REDACTED] and his wife, [REDACTED] hereinafter referred to as "the subordinate"), were directed to marital counseling. The applicant was their assigned counselor. The applicant individually counseled each of them after an initial joint session. After the subordinate reported to her supervisor that the applicant made her uneasy, a "Letter of Clarification" was drafted for signature by both [REDACTED] and the subordinate. On Saturday, 26 August 1995, the applicant called the subordinate at her residence and asked her to come to his office to sign the letter. When she arrived at the applicant's office, the applicant allegedly told her she smelled nice and asked her: what her sexual plans were for the next six months while she waited for her divorce to be finalized; to turn around so he could look at her; if she had a man lined up; what she thought about the applicant; and if she had seen a movie where a patient falls in love with her therapist. The subordinate stayed approximately one-half hour and returned home. The applicant then called her again.

[REDACTED] eventually stopped attending his therapy sessions with the applicant and received an Article 15 for failing to attend the sessions. During his Article 15 presentation, [REDACTED] stated that one of the reasons he quit the sessions was that the applicant was "making moves on his wife."

When [REDACTED] and the applicant's commanders learned of the complaint, they agreed to meet and "clear the air" on the matter. At the meeting, the applicant denied all of the allegations. The commanders did not advise the applicant of his rights before the applicant made the statements because they did not believe he had violated any laws. After the meeting, base phone records were checked to verify the applicant's assertions. The review verified the allegations and at this point, a formal investigation of the appellant began. The commander appointed an officer to investigate the matter. Before the investigating officer interviewed the applicant, he advised the applicant of his rights and the applicant was provided legal representation. During the interview, the applicant admitted to lying to his commander about calling the subordinate at home on 26 August 1995 but denied he made the alleged comments to her.

On 20 October, 1995, applicant was notified of his commander's intent to initiate nonjudicial punishment action against him. The applicant was charged with misconduct in violation of Article 93, Uniform Code of Military Justice (UCMJ), in that on divers occasions between about 24 July and 18 September 1995, he maltreated a subordinate by making deliberate and repeated offensive comments of a sexual nature. The applicant was also charged with misconduct in violation of Article 107, UCMJ, in that

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on or about 22 September 1995, he made a false official statement. The applicant submitted written materials for the commander to review and also made a personal appearance before the commander. The applicant **again** admitted making a false official statement but continued to deny the maltreatment charge. After considering the information, the commander decided the applicant committed the alleged offenses. On 8 November 1995, the commander imposed nonjudicial punishment resulting in a written reprimand and forfeiture of \$900.00 pay per month for two months. The Article 15 action was filed in the applicant's Officer HQ USAF Selection Record and Command Selection Record. The applicant appealed both the Article 15 action and the inclusion of it in his Selection Record. The appeal **was** denied.

Applicant's Contentions: The applicant claims the nonjudicial punishment **was** a "blatant miscarriage of justice." While he **admits** to lying to his supervisor [REDACTED] he contends that it was **his word against the subordinate's** regarding the maltreatment charge and that the subordinate was lying. Regarding the lie to [REDACTED] the applicant stated that he made an "error in judgment" while his supervisor interrogated him under "hostile conditions"¹ without **affording him his rights** under Article 31, UCMJ. The applicant **also** alleges that the commander [REDACTED] ignored the advice of a Board Certified Psychiatrist regarding the subordinate's mental status² and diagnosed her independently. The applicant also alleges that [REDACTED] denied him the opportunity to have an individual present at his personal appearance before [REDACTED]. Lastly, the applicant claims that when [REDACTED] decision was reported to the military personnel flight at Randolph AFB, the base legal office lost all of the documents submitted on the applicant's behalf. The base legal office told the applicant to submit extras. The applicant is now afraid that "the reviewing authorities will decide [his] fate without hearing [his] side."

Discussion: Article 31(b), UCMJ states in pertinent part: "No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement . . . and that any statement made by him may be used as evidence against him." The sworn statement of [REDACTED] which the applicant attached to his presentation reflects that while her **initial** response was to "investigate," she later recanted that statement and said "No, I really think that it would be more appropriate if we got [the applicant and the subordinate] together with [the subordinate's supervisor] . . . in a room. . . . We did not read anybody their rights because this was a fact finding mission. . . . [W]e had determined that . . . if we could settle it at our level, we would. That is what the IG would want us to do, *before any kind of investigation took place*, to settle it at our level." (Emphasis added.) Thus, during this meeting, the applicant was not "an accused or a person suspected of an offense," and there was no requirement to advise the applicant of his rights under Art 31.

During the meeting, [REDACTED] suggested that [REDACTED] contact the Communications Squadron to see if they had a record of the phone calls. The applicant had no reaction to the suggestion. After the meeting [REDACTED] contacted the Communications Squadron to find out if any phone calls were made from the applicant's extensions on 26 August 1996. When the Communications Squadron phoned her back to confirm that two calls had been made on that day from the applicant's extensions to the subordinate [REDACTED] stated "that to me confirmed about 50% of [the subordinate's] story right there." She and [REDACTED] then called the applicant back into her office and "confronted him with the numbers and he said that he had lied because he didn't think I could find that information out." [REDACTED] stated that she kept thinking to herself, "What else did you lie about?" . . . The only thing I know is

¹ In his response to the Art 15, the applicant asserted that he was being "interrogated in a room of six people (five whites), accused of harassing a white woman in the [S]outh was a frightening feeling for me." To the contrary, [REDACTED] sworn statement indicates the applicant lied to her because he didn't think [REDACTED] could find that information out. We concur with [REDACTED] view that this was not a "hostile situation" based upon the applicant's blatant lie to [REDACTED] and the other facts contained in the record.

² [REDACTED] Chief, Mental Health Services, "seriously question[ed] the degree of [the subordinate's] distress over the alleged inappropriate comments when she brings in chocolate chip cookies for [the applicant] and his staff."

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that with those phone calls, I just substantiated 50% of [the subordinate's] story. What makes me want to believe that the first 50% wasn't true as well."

The applicant then became a suspect and was advised of his rights and was represented by legal counsel before being questioned. Subsequently, the applicant was served with nonjudicial punishment under Article 15. After consulting with counsel, the applicant voluntarily chose to proceed with his case under Article 15 rather than demand trial by court-martial. The applicant was also afforded an opportunity to present both written and oral presentations to his commander.

The applicant states in his application that [redacted] denied him the opportunity to have an individual present at his Article 15 presentation. MCM Part V, ¶4c(1)(B) provides that the service member is entitled to "[b]e accompanied by a spokesperson provided or arranged for by the member unless the punishment to be imposed will not exceed extra duty for 14 days, restriction for 14 days, an oral reprimand." However, there is no evidence that the applicant requested to have anyone present during the presentation. According to the [redacted] Legal Office, the applicant did bring his wife to the oral presentation but [redacted] requested that she not attend the presentation due to the sensitive nature of the subject matter. However, prior to the applicant's oral presentation, a representative from the legal office witnessed a conversation between the applicant's immediate supervisor, [redacted] wherein [redacted] spoke in general terms that [the applicant] was a good guy." Based upon these facts, we see no error in the procedures utilized in this case.

There is no evidence that the commander [redacted] the appellate authority [redacted] were anything but neutral and objective. It is the commander's discretion to determine if an offense was committed. While it is impossible to ascertain all matters considered by the commander or the weight and merit he gave to the matters before him, it is clear that the basic elements of the offense are supported by the facts and applicant's actions were in violation of Articles 93 and 107, UCMJ. Clearly, the applicant acted inappropriately. He exercised poor judgment being in the office alone with a client on a weekend. He was also less than forthright when he lied to a superior about calling his subordinate client at her home and about meeting with her on the weekend for only two to three minutes. The commander had sufficient facts before him to prove applicant's misconduct. The appellate authority agreed. Neither was involved in the investigative process. The punishment was appropriate to the offense, and was neither overly harsh nor unreasonable. The applicant's nonjudicial punishment was properly accomplished and the applicant was afforded all rights granted by statute and regulation. The Article 15 is legally sufficient.

Lastly, there is no merit to the applicant's allegation that "the reviewing authorities will decide [his] fate without hearing [his] side." There is no indication he did not have copies of the lost documents, or that these materials were not submitted in support of the subject application. We find no merit in this assertion.

Recommendation: After a review of the available records, I conclude administrative relief by this office is not possible or appropriate. There are no legal errors requiring corrective action. I recommend the Board deny the relief requested.



LOREN S. PERLSTEIN
Associate Chief, Military Justice Division
Air Force Legal Services Agency

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