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d. His Fitness Assessment (FA) score, dated 6 March 2011, be invalidated and deleted from the Air Force Fitness Management System (AFFMS) and any other applicable Air Force system of records it may be filed.

e. An AF Form 469, *Duty Limiting Condition Report*, and AF Form 422, *Notification of Air Force Member's Qualification Status*, be created for the period of 6 March-5 June 2011 to document his medical status and injury during this period.

2. He receive protection under the Whistleblower Protection Act.

APPLICANT CONTENDS THAT:

In a 16-page statement with 19 Exhibits, the applicant presents the following major contentions:

1. He was illegally and inappropriately relieved of command. The individual who relieved him is his commander and immediate supervisor when they are serving in a military capacity. This individual misrepresented their legal status, violated Air Force instructions, violated proper disciplinary procedure, violated accepted standards of both military officer and civilian professionalism and ethics, and possibly violated the Uniform Code of Military Justice (UCMJ) and other laws and provisions of the US Code. His commander and immediate supervisor is employed full time by his assigned Air Wing as a GS-13 civilian Air Reserve Technician (ART) and is the senior ART for the Mission Support Group. The individual also holds a part-time military position in the Air Wing as an Air Force Reserve colonel and commander of the Mission Support Group. The applicant indicates he will differentiate in his submission when his commander was serving in a civilian capacity or in a military capacity. He presents the following points in support of his argument:

a. He was never relieved of command by notification from competent military authority in military status under Title 10, United States Code.

b. Air Force Reserve Command (AFRC) Supplement to AFI 51-202, paragraph 3.6, specifically prohibits a reservist from being involuntarily called to a duty status solely for purposes of initiating or completing non-judicial punishment actions, regardless of their military or civilian status.

c. Air Force Manual (AFMAN) 36-8001V1, paragraph 1.7, requires that an Air Reserve Technician like his supervisor and commander be "off duty or in an official leave or compensatory status from civil service ... when performing military duty" Taking punitive administrative action or administering non-

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judicial punishment to a military member is "military duty" and must be done while in military status.

2. He was called and notified on 7 Feb 11 that his commander wanted him to come in to meet with him either later that day or the next and that he would be placed in military status on a Reserve Management Period (RMP). Because he did not know and his supervisor did not disclose his justification for ordering him into military status, he obeyed what he believed to be a lawful order and reported for duty at 0800 on 8 February 2010 [sic]. His supervisor and commander took disciplinary action against him with written administrative, or possibly non-judicial, punishment and relieved him of command and his military position forcing him into an overage position in another unit. To the best of his knowledge, his commander was not in an active military status on 8 February 2011. The applicant makes the following contentions regarding the action taken against him:

a. In relieving him of command his commander while in civilian status represented himself in a military capacity. His commander used false written statements and allegations against him or events that occurred outside the limits of his authority, in violation of Article 134, and possibly 92 and 107 of the Uniform Code of Military Justice.

b. The written administrative, or possibly non-judicial, punishment was handed to him in the form of a printed email, in violation of specific formatting requirements stipulated by either AFI 36-2907, *Unfavorable Information File Program*, or AFI 51-202, *Non-judicial Punishment*. It was read to him in the presence of another ART,

c. The improper and unprofessional format did not give him an opportunity to acknowledge the action or allegations against him by signature, nor was he advised of his right to formally respond and provide a rebuttal, record his intent to challenge the allegations, or request legal counsel.

d. His commander manufactured "causes" for his removal in order to pursue his openly stated goal of replacing him, a part-time Traditional Reservist (TR), with a full time ART squadron commander. His removal coincided with the publication of a job advertisement on USA Jobs to fill the ART position in the Logistics Readiness Squadron.

3. The Air Wing Commander's refusal to provide proper relief in his situation, or even address the specific points of his defense is one example of a pattern of retribution. The Air Wing vice commander, serving temporarily at the time as commander, refused to engage in a point-by-point reexamination of the evidence he presented against his commander/supervisor. He was only advised that his allegations were not found to have merit.

FOR OFFICIAL USE ONLY – PRIVACY ACT OF 1974

4. His senior rater failed to provide him a copy of the PRF approximately 30 days before the board. In fact, he did not receive a copy of the PRF until 75 days after the conclusion of 13-17 June 2011 Line of the Air Force Reserve Lieutenant Colonel Mandatory Promotion Board. The PRF was poorly and unprofessionally written and rife with errors. According to the 28 September 2011 post-board counseling he received, the completely blank last line in block IV was a primary reason for his non-selection for promotion.

5. He was injured during his 6 March 2011 Fitness Assessment and reported his injury to the appropriate personnel in a timely manner. Proper procedures were not followed in the processing of his score. His injury, medical status, and duty status were never properly documented on AF Forms 469 and 422 for the period of 6 March -5 June 2011.

6. The applicant asserts he is requesting protection under the Whistleblower Protection Act due to a pattern of active and passive-aggressive retaliation and retribution, as well as professional indifference toward his requests for redress after he reported what he reasonably believed evidenced a violation of a law, rule or regulation, gross mismanagement, gross waste of funds, and/or an abuse of authority to various levels of his chain of command. His group and wing leadership bullied and marginalized him, turning him from a valued member of the Air Wing "inner circle" into a pariah, ultimately attempting to disgrace him by manufacturing causes for relieving him of his squadron command, sabotaging his opportunity for promotion, broadcasting his failure to get promoted, and forcing him to transfer units.

The applicant provides a detailed chronological sequence of actions and events he contends support his contention he is the victim of reprisal.

In support of his appeal, the applicant presents 17-page statement with 19 Exhibits consisting of various documents from his personnel record, multiple memorandums for record, and other documents related to his allegations.

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

STATEMENT OF FACTS:

According to information extracted from the Military Personnel Data System (MilPDS), the applicant currently serves in the Air Force Reserve in the grade of major (O-4).

FOR OFFICIAL USE ONLY – PRIVACY ACT OF 1974

A search of available records did not reveal that the applicant had filed a complaint with the Inspector General (IG) related to the matter under review.

AIR FORCE EVALUATION:

The Commander of the applicant's assigned wing provided a response to the allegations leveled by the applicant, which the AFRC/JA approved for release to the Board.

The Wing Commander recommends the application be denied, indicating the actions taken by the Wing leadership regarding the applicant were appropriate and correct. The Wing Commander states he has personal knowledge of many of the issues raised by the applicant. He also received input for his response from the applicant's immediate commander/supervisor and the commander of the squadron to which the applicant was transferred. The Wing Commander provides the following information:

a. The applicant was appointed to the position of commander of the LRS on 6 Dec 2008 and remained in this position until he was transferred to the Aerial Port Squadron (APS) on 8 February 2011. Both units are part of the same Mission Support Group (MSG). The applicant's assignment to the APS was a temporary move to allow him to locate another position in the Air Force Reserves.

b. The Wing Commander indicates he had concerns about the applicant's performance during the first year of his assignment. The Wing was scheduled for an Operational Readiness Inspection (ORI) in December 2009. The entire Wing was focused on preparing for the critical inspection; however, the applicant was not as engaged with his squadron as his other squadron commanders. During the ORI, held from 4-11 December 2009, the Wing deployed to the Combat Readiness Center to demonstrate its ability to operate in a remote site. On the second day of the deployment, a senior member of the inspection team informed him the applicant did not understand critical elements of his job, and that he was failing in his leadership role as the LRS commander. In the final ORI report, LRS leadership was rated as "Marginal." The written "Findings" noted the failures of the LRS commander in several areas. It was clear from the report the applicant had significant deficiencies in his performance as the commander of the LRS. The Wing Commander indicates he personally counseled the applicant concerning his dismal performance in the ORI.

c. The commander/supervisor that is the primary subject of the applicant's complaint was assigned as the MSG commander in November 2010. In his first month in the position, he met individually with each squadron commander in the MSG and

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discussed his expectations of them as leaders in the squadrons. He met with the applicant and expressed his expectations, which specifically included that he wanted the applicant and all members of his squadron to pass the Air Force fitness assessment.

d. The new MSG commander soon began to see problems with the applicant's leadership of the LRS. He determined the applicant was not engaged with his Airmen in a way that commanders should be and that he was uninformed about many squadron issues and did not sufficiently involve himself in addressing problems in his unit.

e. The applicant displayed a lack of judgment in some of his decision making. The Wing Commander provides specific details of the applicant's approval of a two-week annual tour in Hawaii of a member just before retiring and of the applicant's selection of a member of his unit to fill a vacant position in his squadron, despite irregularities in the selection process.

f. According to the Wing Commander, the MSG Commander decided to remove the applicant from his position as commander based on the deficiencies in the applicant's performance. The decision was entirely within the discretion of the MSG Commander and had the full support of the Wing Commander. The Commander indicates it was not in the best interest of the LRS or the Wing for the applicant to remain in his position of command.

g. The PRF prepared on the applicant considered his failures as a commander and accurately reflected what his potential for service in a higher grade was. Regarding the applicant's allegation that his PRF had no input from the unit he was transferred to, the Wing Commander points out the applicant was only assigned to the new unit on a short-term basis after he was removed as commander of the LRS. The PRF was written based on inputs from the MSG Commander and the Wing Commander's own observations. Regarding the applicant's contention he did not receive a copy of the PRF prior to the convening of the promotion board, the Wing Commander notes that the unit responsible for sending out the PRFs indicate they did so, but cannot provide a date. Nevertheless, the Wing Commander points out the applicant was aware he was supposed to receive a copy of the PRF, but made no effort to notify anyone he had not received the PRF.

h. Regarding the applicant's request to remove the results of his Fitness Assessment from the AFFMS, the Wing Commander notes the applicant did not notify the monitor that he had injured his back until after the assessment. The applicant reported his injury to the Wing clinic and then requested the APS commander invalidate his score. The APS commander also received an email from a doctor at the clinic recommending the score be invalidated. She requested guidance from the MSG commander and was advised to invalidate the score. However, upon notification

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of the fitness assessment monitor to invalidate the score for the sit-up requirement, the APS commander was advised that only the entire assessment could be invalidated, not just the sit-up requirement. Additionally, the APS commander was provided information of the applicant's history regarding the fitness assessment. After considering the totality of the circumstances related to the applicant's failure, it was decided not to invalidate the score. The Wing Commander points out there was no pressure on the APS commander and that she made the decision of how to handle the applicant's fitness assessment score.

The complete evaluation by the Wing Commander, with an extract of the ORI results for the LRS, is at Exhibit C.

AFRC/JA recommends denial of the applicant's application. The applicant's contention that his commander had no authority to remove him from command is irrelevant because the requirement to be in a military status only applies to punitive actions under the UCMJ (e.g. Article 15 and Court Martial actions), not to administrative actions like letters of reprimand (LOR), administrative discharges, or removals from command. He also claims he never received the PRF that was mailed to him, but failed to bring that to the attention of the unit until after the results of the promotion board were released. Finally, with respect to his FA test, a commander may invalidate a test when a member is injured but is not required to do so by the AFI. Under these circumstances, where he did not notify anyone of the injury until after the test was over, and noting his two previous FA failures, the commander had valid reasons to exercise her discretion to not invalidate the FA.

The complete AFRC/JA evaluation is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATIONS:

The new information from the Wing Commander is a fabrication and inconsistent with the facts. While the applicant indicates the Wing Commander did not take his application seriously enough to respond to every specific allegation, the applicant provides a point-by-point reply to each of the Wing Commander's explanations. The Wing Commander's assertion the applicant was not as engaged with his unit as other commanders ignores the fact that he attended numerous meetings in advance of the unit's ORI that were not attended by other traditional (part-time) commanders. Because he was serving on active duty in support of another organization, he was able to dedicate several hours per day on average helping his squadron and wing prepare for the ORI, even though it technically violated an agreement between his unit and the other organization. As to the assertion that he was given feedback about these concerns, he was given no negative

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feedback during this time; in fact, he was given no meaningful feedback at all, even when solicited. Additionally, this new information is also inconsistent with the actions of both the Wing and MSG commanders to support his candidacy for the Air Reserve Technician (ART) (full-time) LRS commander position during the matter under review. This action would be highly inconsistent with the Wing Commander's latest accusations. While the Wing Commander selectively cites a small section of the ORI Report as the basis of his current recommendation, he fails to indicate that his squadron received an overall "Satisfactory" score during the inspection and that he was personally responsible for 21 of 90 graded functions, which resulted in the Wing receiving an overall passing grade. Additionally, his post-ORI performance reports contain laudatory comments related to his efforts during the ORI, which are inconsistent with the Wing Commander's advisory opinion in the instant case. While the Wing Commander describes a portion of the feedback the applicant received from the new MSG commander, he was told that his decision to turn down the full-time ART position showed "poor judgment" after others had stuck their necks out to secure the position for him. He indicated this decision by the applicant showed poor judgment as a squadron commander and that he intended to convert his position into a full-time ART position. His MSG commander then manufactured causes for the applicant's removal from his traditional (part-time) command position to pursue his openly-stated goal of replacing him with a full-time ART commander. His removal from his position coincided closely with the advertisement of the full-time position through USA Jobs.

As for the remaining allegations which formed the basis of the action to relieve him of command (sending a member of his squadron to Hawaii for annual training shortly before her retirement and participating in racial discrimination by altering the conditions of a promotion selection process to deny a promotion to an African American member of his squadron), the applicant reiterates that these allegations are false and therefore undermine the propriety of the commander's decision to relieve him of command.

As for AFRC's position that his commander's status when he was relieved from command is irrelevant, AFRC and the command are trying to have it both ways without having to produce any hard evidence to support their position. While AFRC indicates the requirement for a commander to be in a military status only applies to Uniform Code of Military Justice (UCMJ) actions, (rather than administrative actions), his commander stepped over the line when he accused him of a court-martial offense (gross dereliction of duty), and manufactured false causes for his removal (e.g., criminal accusations amounting to racial bias and fraud, waste, and abuse). It is one thing for a group commander to respectfully tell a squadron commander that his time is up, administratively speaking, but completely another when such a

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commander, in civilian legal status, falsely accuses a squadron commander of crimes without the protection of due process, takes positive action (drafting inaccurate PRF) to destroy that commander's career, and orders a traditional reservist away from their civilian employment into military status outside of a scheduled Unit Training Assembly (UTA) - something only the National Command Authority has the authority to do.

While the Wing Commander correctly states that a group commander has the authority to remove a squadron commander within his or her group, they may not do so under false pretenses for the purpose of retribution and retaliation.

As for his contention he did not timely receive his PRF for review, the Wing Commander blame shifts to the Mission Support Squadron, then to the applicant, when the responsibility is solely his to provide a copy of the PRF to the applicant at least 30 days prior to the promotion board in accordance with the governing statute and Air Force instructions.

As for his fitness assessment, the applicant simply asks the Board to weigh the evidence surrounding his request to have his Fitness Assessment invalidated. As he has already explained, the unit's fitness assessment scoring and medical processes broke down and his chain of command took advantage of the situation by failing to intervene and ensure he received proper medical documents at the same time they were retaliating against him with an inaccurate PRF.

In support of his response, the applicant provides an eight page expanded statement.

The applicant's complete response is at Exhibit F.

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 alleges he has been the victim of an error or injustice (10 USC 1552) and that he has been the victim of reprisal and has not been afforded full protection under the Whistleblower Protection Act (10 USC 1034). Among his many allegations, he contends that his command retaliated against him for his reporting of what he believed were violations of law, rule or regulation; gross mismanagement; gross waste of funds; and/or an abuse of authority to various levels of his chain of command. He

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argues the command's action to relieve him of his command, deliberately render him a faulty promotion recommendation form (PRF) and then deprive him of the opportunity for timely review, and refusal to invalidate his fitness assessment (FA) in the aftermath of an injury constitutes a pattern of retaliation, which is inconsistent with his well documented superior duty performance and potential and the command's previous efforts to recruit him for full-time employment as an Air Reserve Technician (ART). In response to his many allegations, his Wing Commander and AFRC/JA have rendered a comprehensive evaluations, to which the applicant has provided a lengthy rebuttal. After a thorough review of the evidence before us, and noting the applicant has not availed himself of the Inspector General (IG) process, we do not find his uncorroborated assertions or the documentation provided sufficient to establish that he was the victim of an error or injustice as defined in 10 USC 1552, or that he was the victim of reprisal as defined in 10 USC 1034. Nevertheless, the Board finds the allegations made by the applicant troubling and believes that to render a fair and equitable consideration of this case, an investigation should be conducted by the Inspector General. We do not know why the applicant failed to file a complaint with the Inspector General, but under the authority granted to this Board on this issue we find that an investigation appears warranted. Therefore, it is our determination that a final decision not be rendered on the applicant's requests until such time as the Inspector General conducts an investigation at our request and the report of investigation (ROI) is provided to us for our review. Upon receipt of the IG ROI, or if for some reason, the IG should determine an investigation cannot be conducted, we will reopen the applicant's case and resume consideration of his requests. Therefore, it is our determination the applicant's case be administratively closed, without prejudice, until appropriate action by the IG has concluded and this Board has been so advised.

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.

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-2011-04023 in Executive Session on 10 Apr 12, under the provisions of AFI 36-2603:

Mr. (b) (6) [REDACTED], Panel Chair
Mr. (b) (6) [REDACTED] ber
Ms. (b) (6) [REDACTED], Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 6 Nov 11, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, 908 AW/CC, dated 7 Feb 12, w/atchs.
- Exhibit D. Letter, AFRC/JA, dated 24 Feb 12.
- Exhibit E. Letter, SAF/MRBR, dated 1 Mar 12.
- Exhibit F. Letter, Applicant, dated 30 Mar 12.

(b) (6) [REDACTED]

