JUN 29 1998

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: [redacted]

DOCKET NUMBER: 94-00614

NS : [redacted]

HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

His 24 November 1993 general discharge be rescinded; the Article 15 actions and reprimands be expunged; the Enlisted Performance Report (EPR) closing April 1991 be removed from his records; his rank of technical sergeant (E-6) be restored with all back pay and allowances; and he be given supplemental promotion consideration for promotion to the grade of master sergeant (E-7).

EXAMINER'S NOTE: Applicant submitted this application on 28 December 1993. However, in accordance with counsel's request the case was withdrawn, without prejudice, on 10 February 1995. Per letter dated 3 March 1997, counsel requested the processing of the case be continued (Exhibit J).

APPLICANT CONTENDS THAT:

Oral and written statements made by him during the Article 15 process were done without him having been read his rights under Article 31, UCMJ. Because of this, the Article 15 actions should not have been considered as evidence in his discharge board hearing.

The EPR closing 1 April 1991 should be expunged from his records because he still perceives himself as a victim of racism.

In support of his request, applicant provided counsel's expanded comments, with 14 attachments. (Exhibit A)

STATEMENT OF FACTS:

Applicant contracted his initial enlistment in the Regular Air Force on 2 February 1984, in the pay grade of airman first class (E-3). He served on continuous active duty, entering his last enlistment on 18 October 1991. His highest grade held was technical sergeant. He was reduced to the grade of staff sergeant (E-5), effective 1 March 1993, as a result of punishment imposed under Article 15, UCMJ.

A resume of applicant's APRs/EPRs follows:

	PERIOD CLOSING		OVERALL EVALUATION
	1 Feb 85		9
	1 Feb 86		9
	1 Feb 87		9 (w/LOEs)
	15 Sep 87		9
	15 Sep 88		9
	1 Apr 89		9
	1 Apr 90	(EPR)	4
*	1 Apr 91		3 (Referral Report)
	14 Oct 91		5
	11 Feb 92		5
	11 Feb 93		2

* Contested report. Applicant appealed this report under the provisions of AFR 31-11, On 24 June 1991, the Airman Personnel Records Review Board denied his request,

On 21 April 1992, the AFBCMR considered and denied an application submitted by applicant requesting that the EPR closing 1 April 1990 be declared void and removed from his record, or in the alternative, the promotion recommendation be upgraded to a "5"; and that the EPR closing 1 April 1991 be declared void and removed from his records (see Record of Proceedings at Exhibit C).

On 23 February 1993, the group commander notified applicant of his intent to impose nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), for making a false official statement to MSgt E---, on or about September 1992, to wit: "extend my DEROS election option because it has been preapproved by my commander," or words to that effect, which statement was false in that his commander never preapproved his DEROS extension. On 1 March 1993, applicant acknowledged that he understood his rights concerning nonjudicial punishment proceedings, that he had consulted a lawyer and he waived his right to demand trial by court-martial, and that he desired to make oral and written presentations to the commander. On 1 March 1993, the commander determined the applicant had committed one or more of the alleged offenses and imposed punishment consisting of a suspended reduction to the grade of staff sergeant and 45 days of extra duty. Applicant did not appeal this decision.

On 22 March 1993, the commander notified the applicant of his intent to vacate the suspended punishment for violation of Article 92, UCMJ, in that, on or about 12 March 1993, applicant failed to obey a lawful order issued by [redacted] to remain in his assigned living quarters. On 25 March 1993, applicant acknowledged that he understood his rights concerning the action being taken, that he had consulted a lawyer, and that he desired to make oral and written presentations for consideration. On 25 March 1993, the commander determined the applicant had committed one or more of the alleged offenses and vacated the suspended nonjudicial punishment.

On that same date, applicant acknowledged that he had seen the action taken on the proposed vacation of suspended nonjudicial punishment.

On 16 April 1993, the group commander initiated administrative discharge action against the applicant for a pattern of misconduct, conduct prejudicial to good order and discipline. He recommended that the applicant be separated with an under other than honorable conditions (UOTHC) discharge. On that same date, applicant acknowledged receipt of the letter of notification, that legal counsel had been made available to him, and his understanding that approval of the recommendation for discharge could result in his receipt of a UOTHC discharge.

On 8-16 June 1993, a Board of Inquiry convened under the provisions of AFR 39-10, to determine whether discharge prior to the expiration of applicant's term of service was appropriate because of a pattern of misconduct, conduct prejudicial to good order and discipline. After considering all the evidence in closed session, by secret ballot, a majority of the voting members concurring, the board found that applicant: (a) was, on or about 12 March 1993, placed on quarters due to an illness and was ordered to remain in his assigned living quarters during the period he was excused from duty and he failed to obey this lawful order issued by [redacted]; (b) did, on or about 31 August 1992, make to [redacted] an official false statement to extend his DEROS option because it had been preapproved by his commander, or words to that effect; (c) did not, on or about 23 March 1993, telephone the Numbered Air Force commander about the status of leave he requested, displaying a disregard for the respect deserved by any supervisor let alone a major general and a numbered Air Force commander; (d) did, on or about 22 March 1993, communicate to the Governor a need for his assistance ensuring his military leave to attend a modeling competition in [redacted] despite his commander telling him that his leave would not be approved because of a Health Services Inspection scheduled for 11-16 April 1993; (e) was not, on or about 23 March 1993, removed from the dental squadron due to his continued disruptive behavior and failure to follow his respective chain of command; (f) did not, on or about 7 July-11 December 1992, submit seven suggestions to the Air Force Suggestion Program concerning dental topics. The suggestions were unclear and based upon unresearched ideas, discredited his job related knowledge and skills, created turmoil among the staff and created unfavorable publicity for the clinic. Specifically, one of his suggestions alleged that Navy dentists were not seeing as many patients as Air Force dentists which was false, full of innuendoes and almost ruined superb Air Force and Navy squadron dental relations. The Board found applicant was subject to discharge under the provisions of AFR 39-10, paragraph 5-47b, and recommended he be separated with a general discharge and that he not be offered probation and rehabilitation with a conditional suspension of the discharge.

On 22 November 1993, the Chief, Civil Law, found the file legally sufficient and the board's findings and recommendations consistent

with and supported by a preponderance of the evidence. The wing staff judge advocate concurred. On 22 November 1993, the discharge authority approved a general discharge and determined that probation and rehabilitation were inappropriate.

On 24 November 1993, applicant was discharged under the provisions of AFR 39-10 by reason of misconduct, with service characterized as general (under honorable conditions). He was credited with 10 years and 8 months of active Federal service.

AIR FORCE EVALUATION:

The Associate Chief, Military Justice Division, AFLSA/JAJM, reviewed this application and found the Article 15 actions legally sufficient and procedurally sound.

JAJM stated applicant's contentions that he simply was not guilty of the stated offenses is simply without merit. Applicant's personnel records contain the supporting documentation that provided the basis for the two Article 15 actions. The representations of the Base Personnel NCO were that applicant had clearly misrepresented the status of his commander's approval of the DEROS action to him. The placing on quarters letter clearly put applicant on notice as to what was required of him and his actions, as observed directly by his commander, clearly violated his on-quarters status. Applicant's procedural complaint that the Article 15 process took place without rights advisement is also wholly without merit. The Article 15 documents appear regular on their faces and it appears that applicant voluntarily waived his right to appear before a court-martial and thus avail himself of all of the rights that such a forum provided. By contrast, nonjudicial punishment proceedings are essentially administrative in nature and the Fifth and Sixth Amendment rights that applicant would have enjoyed at a court-martial do not attach. There was no requirement that rights advisements be given during the Article 15 presentations. The discharge board thus acted properly in receiving the records into evidence. There is also no evidence to establish that applicant's attorney forced him to accept the Article 15s. (Exhibit D)

The Retirements & Separations Program Section, AFMPC/DPMARSP, reviewed this application and recommended denial. After a review of the case, DPMARSP found no error or irregularities causing an injustice to the applicant. The discharge complies with directives in effect at the time of applicant's discharge. The records indicate applicant's military service was reviewed and appropriate action was taken. (Exhibit E)

The SSB and BCMR Appeals Section, AFMPC/DPMAJA1, reviewed applicant's request that the EPR closing 1 April 1991 be voided. DPMAJA1 stated that the applicant has' provided bits of his own opinion (or that of whomever authored his brief) rather than

submitting concrete evidence in the form of statements from witnesses who could verify that the evaluation represented on the contested EPR was driven by, or was the direct result of, alleged "racism." Furthermore, his analysis presupposes that the rater and indorser both conspired in this "racism" since they both cited his shortcomings in their comments. Although alleged, his documentation fails to show that the evaluators didn't provide an accurate report at the time this EPR was rendered. Even his own evidence (atch 12) states, "There was an investigation and...there were no signs of mismanagement or racial discrimination." (Exhibit F)

The Chief, Social Actions Branch, AFMPC/DPMYCS, noted counsel's statement that, "Where under the application of due process and equity, were violated when applicant filed a Social Action complaint when the commander was one of parties being complained about when there is an off line conversation between social actions personnel and the commander giving the commander the results of the investigation, which procedure is not allowed by AFR 30-2." DPMYCS stated applicant's allegations were not substantiated. The results of the inquiry were briefed to applicant and documented on the AF Form 1587 (Equal Opportunity and Treatment Summary). There is no record that any of the alleged offenders were briefed the results of the inquiry. (Exhibit G)

The Airman Promotions Branch, AFMPC/DPMAJW1, provided comments addressing reinstatement of applicant's rank of technical sergeant and supplemental promotion consideration,

Should the Board void the Article 15 action and reinstate applicant's technical sergeant grade, he would have an effective date and date of rank of 1 July 1991. Based on this date of rank, the first time he would have been considered for promotion to master sergeant would have been cycle 94A7 (promotions effective Aug 93 - Jul 94), providing he was otherwise eligible and recommended by his commander.

Providing the applicant is returned to active duty without a break in service, his technical sergeant grade is reinstated, and the Board voids the contested EPR, he will be entitled to supplemental promotion consideration beginning with cycle 94A7 to master sergeant once he has tests on file. This is contingent upon the applicant being otherwise eligible and recommended by his commander. DPMAJW1 noted applicant's EPR closing 11 February 1993 has an overall rating of "2" (Not recommended for promotion at this time). (Exhibit H)

The Senior Attorney-Advisor, AFPC/JA, reviewed this application and provided comments on issues raised by applicant's counsel with respect to due process and equity. JA stated the context in which applicant's counsel uses the terms "due process" and "equity" essentially reduces them to mere surplusage, since they add nothing to the already fatally flawed arguments she propounds.

In plain language, applicant's counsel is stating the Air Force's actions in punishing and discharging applicant were illegal (without "due process") and unfair (without "equity"). The use of these legal terms of art adds nothing to the merits of applicant's claim, however. It merely raises the fundamental issues present in virtually every case brought before the AFBCMR: Was the action taken against applicant legal, and if so, was it fair? In this case, the actions taken against applicant were both legal and fair.

Unable to discern any error or injustice warranting relief, JA recommended this application be denied in its entirety.

The complete evaluation is at Exhibit K.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Applicant disagreed with the recommendations in the advisory opinions and stated that what really needs to happen is for this case to be retried because it was not fairly conducted.

Applicant provided copies of documentation pertaining to the Article 15 actions, extracts from the discharge correspondence, a statement from the individual who signed the quarters policy letter, and a letter of recommendation.

Applicant's response, with attachments, is at Exhibit M.

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.

a. Applicant's contentions that oral and written statements made by him during the Article 15 process were done without his having been read his rights under Article 31 are duly note. However, after careful consideration of the evidence provided, we agree with the comments of the Air Force offices of primary responsibility (AFLSA and AFPC/JA) and adopt their rationale as the basis for our conclusion that the applicant has not been the victim of an error or injustice. The commander had the discretionary authority to impose nonjudicial punishment under Article 15, UCMJ, when he concluded that reliable evidence existed to indicate an offense was committed. When offered the Article 15 actions, applicant had an opportunity to demand trial by court-martial thereby requiring the prosecution to establish his guilt beyond a

reasonable doubt. However, he chose not to pursue this avenue and accepted the Article 15 actions instead. Applicant has not provided any evidence to sufficiently convince the Board that the commander abused his discretionary authority in imposing the Article 15 punishments. Nor did we find any evidence that the applicant's rights were violated during the Article 15 process or that the Article 15 actions were contrary to the governing regulation. Absent persuasive evidence applicant was denied rights to which entitled, appropriate regulations were not followed, or appropriate standards were not applied, we conclude that no basis exists to recommend favorable action on applicant's request to expunge the Article 15 actions from his records.

b. With regard to applicant's request that the EPR closing 1 April 1991 be removed from his records, we note that other than his own assertions, the applicant has not presented any evidence showing that the evaluators who were tasked with the responsibility of assessing his performance were unable to render unbiased evaluations of his performance or that their ratings were based on factors other than the applicant's duty performance during the contested rating period. In view of the above and in the absence of evidence to the contrary, we find no compelling basis to recommend removal of the report from the applicant's records.

c. Having found the Article 15 actions to be valid, we are not persuaded that the receipt of this information into evidence before the administrative discharge board was improper or contrary to the governing regulation in effect at the time. Therefore, in the absence of persuasive evidence that responsible officials applied inappropriate standards in effecting the separation, that pertinent regulations were violated or that applicant was not afforded all the rights to which entitled at the time of discharge, we conclude that there is no basis upon which to recommend favorable action on his request to rescind his administrative discharge, restore his previous rank of E-6, and allow him to meet a supplemental promotion board for promotion consideration to the grade of E-7.

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 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 15 May 1998, under the provisions of AFI 36-2603:

Mr. LeRoy T. Baseman, Panel Chair
Mr. Steven A. Shaw, Member
Mr. Parker C. Horner, Member

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 28 Dec 93, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Record of Proceedings, AFBCMR 92-00026, w/o Exhibits.
Exhibit D. Letter, AFLSA/JAJM, dated 19 Aug 94.
Exhibit E. Letter, HQ AFMPC/DPMARSP, dated 2 Sep 94.
Exhibit F. Letter, HQ AFMPC/DPMAJA1, dated 23 Sep 94.
Exhibit G. Letter, HQ AFMPC/DPMYCS, dated 17 Oct 94.
Exhibit H. Letter, AFMPC/DPMAJW1, dated 27 Oct 94.
Exhibit I. Letter, SAF/MIBR, dated 1 Nov 94.
Exhibit J. Letter from Counsel, dated 20 Jan 95; AFBCMR Response to Counsel, dated 10 Feb 95; Letter from Counsel, dated 3 Mar 97.
Exhibit K. Letter, AFPC/JA, dated 26 Jun 97.
Exhibit L. Letter, SAF/MIBR, dated 7 Jul 97.
Exhibit M. Letter from Applicant, dated 22 Jul 97, w/atchs.

LEROY T. BASEMAN
Panel Chair