RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

JUL - 11998

IN THE MATTER OF: [redacted]

DOCKET NUMBER: 94-02889, CS#2

COUNSEL: None

HEARING DESIRED: Yes

APPLICANT REQUESTS THAT:

1. The Enlisted Performance Report (EPR) rendered for the period 24 October 1992 through 23 October 1993 be either upgraded or declared void.

2. The punishment imposed upon him under Article 15, Uniform Code of Military Justice (UCMJ), dated 30 June 1993, be set aside.

3. Any and all records pertaining to the events indicated in the Article 15, dated 30 June 1993, be removed from his Personnel Information Files (PIF), to include the following documents:

a. AF Form 286a, signed 27 July 1993, by BG K...A... --

b. AF From 590, signed 27 July 1993 by BG K...A... (Withdrawal/Reinstatement to bear firearms).

c. AF Form 2086 (sic), signed 28 July 1993, by Captain T...S...

d. Any and all documents relating to the Referral EPR (letter, signed on 7 March 1994 by SMSgt E...S... and the 16 March 1994 letter signed by applicant).

e. AF Form 77, dated 24 March 1994, signed by Lt Col R...B...

f. AF Form 2086 (sic), signed 22 April 1994, by Major K... J...

g. Computer printout of Classification *of* Training, dated 22 (sic April 1994.

h. AF Form 418 (Reenlistment) signed by Lt Col R...B..., dated 25 April 1994.

i. Letter, signed 29 April 1994, by Captain D...M...

j. Letter, dated 8 November 1995, Ref: Issuance of Temp I.D. Cards, signed by,Captain D...M...

4. The EPR rendered for the period 24 October 1993 through 25 July 1994 be declared void or the grade be changed.

5. He be considered for promotion to the grade of staff sergeant by cycles 93, 94A, and 95A.

6. He be restored to active duty and allowed to reenlist for period of four (4) years.

APPLICANT CONTENDS THAT:

Another airman made a pass at him, he threw the airman out of his (applicant's) room and threatened to tell others about the act. Applicant indicates that the other airman made a preemptive complaint in order to protect himself. Applicant contends that his commander believed that by accepting the Article 15, he (applicant) was guilty of the act and the commander refused to wait for serology results from the laboratory of a semen stained towel which would have proved applicant's innocence. He indicates that his commander was vindictive.

In support of his request, he submits copies of the Article 15 and the denial of the set-aside request; an excerpt from the transcript of the AFR 39-10 Administrative Discharge Board and the Report of the Board Proceedings; supporting letters, the contested EPRs, and related documents; documentation relating to his appeal of his non-selection for reenlistment; and the taped recording of the Administrative Discharge Board proceedings

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

On 31 December 1990, the Air Force Board for Correction of Military Records considered and granted an application for correction of military records in applicant's behalf. As a result, applicant was reinstated to active duty. A complete copy of the Record of Proceedings of that application is attached at Exhibit B.

During the time period in question, applicant was serving in the Regular Air Force in the grade of airman first class.

Between 3 June 1993 and 13 August 1993, the Air Force Office of Special Investigation (AFOSI), initiated an investigation of indecent acts with another, in violation of Article 134, Uniform Code of Military Justice (UCMJ). The information received indicated that applicant, while in his room, masturbated another airman and than used the other airman's hand to masturbate himself. Interviews were obtained during this time period and evidence was collected which consisted of items of clothing from both airmen, towels, blankets, sheets, blood and saliva samples from both airmen and a semen sample from applicant. The physical

evidence was forwarded to the US Army Criminal Investigations Laboratory (USACIL) [redacted] for analysis on 8 June **1993.**

On **23** June **1993,** applicant was administered a polygraph test by the AFOSI. It was the opinion of the polygraph examiner that applicant's responses to the relevant questions indicated deception.

On **17** June **1993,** while serving in the grade of sergeant, applicant was notified of his unit commander's intent to impose nonjudicial punishment upon him for the following: **"You,** did at RAF [redacted] on or about **3** June 1993, wrongfully commit indecent acts with [redacted] by masturbating the said [redacted] penis with your hand and placing the said [redacted] hand on your penis."

On 24 June **1993,** applicant was advised that there was a change of unit commander and that the new unit commander would decide whether or not to impose non-judicial punishment, and if *so,* the terms of the punishment. Applicant acknowledged receipt of the notification.

On **30** June **1993,** after consulting with counsel, applicant waived his right to a trial by court-martial, requested a personal appearance and submitted submit a written presentation.

On **30** June **1993,** applicant was found guilty by his unit commander who imposed the following punishment: reduction in grade from sergeant to airman first class, with a date **of** rank of **30** June **1993,** and a reprimand which indicated that applicant's indecent homosexual acts on or about **3** June **1993** were reprehensible and that such behavior was incompatible with military service and seriously impaired the accomplishment of the military mission.

On **30** June **1993,** applicant's unit commander notified applicant that he was being Permanently Decertified from the Personnel Reliability Program (PRP) and that his authority to bear firearms was being withdrawn based on the fact that he had wrongfully committed an indecent homosexual act on or about **3** June **1993** and that such behavior did not meet the necessary standards for duties under PRP and was not consistent with having the authority to bear firearms.

On 1 July **1993,** another new unit commander took command of applicant security police squadron.

Applicant appealed the punishment; however, the appeal was denied on 18 July **1993** by the appellate authority. On **19** July **1993,** the new unit commander directed the Article 15 be filed in applicant's Unfavorable Information File (UIF).

On 27 July **1993,** the reviewing official, BG K...A..., approved applicant's PRP decertification and the withdrawal of his authority to bear firearms.

On 13 August 1993, a review of the USACIL [redacted] Chemistry-Serology laboratory report disclosed semen staining on the beige towel seized from applicant's room and the laboratory analysis eliminated the other airman as the contributor of the stain.

On 9 September 1993, applicant was notified of his squadron commander's intent to recommend him for a general discharge for homosexuality, in accordance with AFR 39-10, Section G, paragraph 5-35a. Specifically, the commander indicated that his reason for this action was that applicant committed homosexual acts with another airman on or about 3 June 1993.

The commander advised applicant of his right to consult legal counsel; present his case to an administrative discharge board; be represented by legal counsel at a board hearing; submit statements in his own behalf in addition to, or in lieu of, the board hearing; or waive the above rights after consulting with counsel.

On 20 September 1993, after consulting with counsel, applicant did not waive his right to an administrative discharge board.

Applicant was notified on 13 December 1993 that his Administrative Discharge Board would be held on 17 December 1993.

On 17 December 1993, an Administrative Discharge Board was convened at RAF [redacted] After considering the evidence, a majority of the Board found that applicant did not commit a homosexual act for which he received an Article 15. They recommended that applicant be retained in the Air Force.

On 10 January 1994, applicant requested that his unit commander set-aside the Article 15 on the basis of the findings and recommendations of the Administrative Discharge Board. After reviewing applicant's request, his unit commander denied the request to set-aside the Article 15 and so notified applicant on 23 February 1994. The unit commander stated "In considering your request, I have considered your entire military record, your failure of the AFOSI polygraph examination, the AFOSI serology report, the AFOSI report of investigation, the results of your administrative discharge board, the results of [redacted] administrative discharge board. After careful consideration of the facts and circumstances surrounding this case, I am not persuaded that there is any new evidence that causes a clear injustice within the meaning of AFR 111-9. I remain convinced that you did engage in the alleged homosexual act.''

Applicant's defense counsel appealed to the unit commander on 17 March 1994 to set aside the Article 15. There is no indication in the record that the unit commander approved the request.

On 13 April 1994, applicant, while serving in the grade of airman first class, was not recommended for reenlistment by his supervisor. The supervisor stated, "A historical review of [applicant's] excellent duty performance is marred by a nonjudicial punishment for which he was found guilty. A considerable amount of positive information dated prior to the aforementioned incident is on record, however, I do not feel this counterbalances the situation. Without the removal or reversal of this finding, I do not foresee a mutually productive relationship between the US Air Force and [applicant] as realistically obtainable through reenlistment." Applicant's unit commander did not select applicant for reenlistment on 25 April 1994. Applicant appealed this decision on 2 May 1994.

A legal review was conducted by the Staff Judge Advocate (SJA), 48FW/JA and on 17 August 1994 concluded that the 48FW/CC should concur in the recommendation to deny reenlistment and forward the case to 3AF/CC for a final decision. On 1 September 1994, the SJA, 3AF/JA conducted a legal review of the case. The SJA did not concur with the 48FW/JA legal review and its recommendations; nor that of the 48FW/CC. The package was not legally sufficient to support the nonselection for reenlistment. The SJA offered the following options to the 3AF/CC: approve the appeal and allow applicant to reenlist; deny the appeal; or return the case to the 48FW/CC for reconsideration based upon a recent EPR with a "5" rating which was inconsistent with the nonselection recommendation. On 6 September 1994, the appeal was approved by 3AF/CC, MG J.A.

In a Memorandum for Record, dated 18 October 1994, the appellate authority for the Article 15, indicated that when applicant was informed of the 3AF/CC's decision, he was told he was allowed to reenlist. His assignment to the Security Police Squadron was changed to Mission Support Squadron while his application for retraining was being processed. During this processing, it was noted that applicant was ineligible to reenlist since he was in grade E-3 in his second term of enlistment. Under the Date of Separation (DOS) rollback program, applicant was ineligible to reenlist and therefore could not remain on active duty later than December 1994. However, this information was not discovered at the time he appealed his reenlistment. His appeal was processed and decisions were made based on the belief that he would be eligible to reenlist if his appeal was sustained by 3AF/CC. The appellate authority further indicated that while he was still convinced that applicant's punishment was appropriate, unusual circumstances now existed which caused him to decide that reduction in grade should be set-aside. Therefore, after reviewing all the information related to the nonrecommendation of reenlistment appeal and the decisions made in good faith, he realized that applicant had been told he could reenlist. In his opinion, the only way to preserve the integrity of the nonrecommendation appeal process was to set aside the reduction in grade so applicant could reenlist.

On 14 December 1994, applicant reenlisted in the Regular Air Force, in the grade of E-4, for a period of two years and cross-trained into another career field.

On 25 July 1995, applicant's permanent decertification was removed by order of the commander 50 Space Wing (50SW/CC).

Applicant was promoted to the grade of staff sergeant on 1 November 1995.

As a result of receiving a referral EPR for the period ending 21 August 1996, applicant was not selected for reenlistment. The rater of this EPR stated in his comments, "Needs to accept the responsibilities expected of a noncommissioned officer and lead by example.--Solicited/coerced subordinates to perform his duties for money, was caught and lied to cover track." The indorser stated, "Lack of integrity-late for mandatory training and in attempt to provide excuse, was caught in a lie. Once [applicant] decides to accept responsibility for his actions, he can become as asset to the unit."

A resume of the applicant's performance reports since 1991 follows:

	PERIOD ENDING	OVERALL EVALUATION
	11 May 91	5
	23 Oct 91	5
	23 Oct 92	4
*	23 Oct 93	3 (Referral)
*	25 Jul 94	5
	21 Aug 95	5
	21 Aug 96	2 (Referral)

*Contested reports

Applicant was released from active duty on 13 December 1996 and transferred to the Reserve of the Air Force in the grade of staff sergeant, in accordance with AFI 36-3208, Completion of Required Active Service. He served a total of 9 years, 11 months and 15 days of active duty.

AIR FORCE EVALUATION:

The Associate Chief, Military Justice Division, AFLSA/JAJM, reviewed the application and states that in response to applicant's contentions, his commander had sufficient evidence to support his finding that applicant committed the offense alleged in the Article 15. The fact that a discharge board reached a different conclusion does not impeach the Article 15. Therefore, they recommend denial of the application.

A complete copy of the evaluation is attached at Exhibit C.

The Chief, Special Activities, AFPC/DPPAES, reviewed the application regarding his reenlistment eligibility and states that the Reenlistment Section determined that the Selective Reenlistment Program action was inappropriate and instructed applicant's military personnel flight to remove the **AF** Form **418** from the record. Further, they have determined that applicant's RE code when he separated on **13** December **1996** should reflect **"4I:** Serving on Airman Control Roster according to AFR **35-32,"** versus "2X." They have notified the appropriate office of the **RE** code change and the record will be corrected.

A complete copy of the evaluation is attached at Exhibit D.

The Staff Judge Advocate, AFPC/JA, reviewed the application and states that applicant's requests are essentially an effort to modify his record to have it appear as if the Article **15** and any attendant consequences had never occurred. They also note that applicant is asking for removal of all documents relating to the discharge action, since the discharge board found in his favor. They state that such a request has no basis in reason. Just because an administrative proceeding finds in favor of a respondent is no reason to remove all indicia of its existence from his records. The relief sought with regard to the EPRs and promotion would merit consideration only if the underlying Article 15 action were removed from his records.

Applicant's argument that all mention of these records should be completely erased from his records apparently stems from his belief that the discharge board's finding that he did not commit the alleged act somehow absolves him from any wrongdoing. No one disagrees that the discharge board was not persuaded by a preponderance of the evidence that applicant committed the act. They do disagree on what the proper effect of such a finding is. The board's finding does not mean that the underlying facts upon which the allegations were based did not occur. It only means that the board did not believe the evidence was sufficient for the government to carry its burden. It was not a finding of "factual innocence."

In denying applicant's Request for Set Aside of Nonjudicial Punishment, his commander specifically stated that he had assessed the alleged co-participant's credibility and concluded he was telling the truth. The commander also listed the other factors he considered: applicant's entire military record, the AFOSI polygraph failure, the AFOSI report of investigation, the AFOSI serology report, and the results of both administrative discharge boards. Therefore, the serology report which applicant believes so significant was considered in denying his request to set aside the Article 15 action. Since there was a legally sufficient factual basis for taking administrative action, the AFBCMR should not substitute its judgment for that of applicant's chain of command. The standard for determining whether an

administrative decision is supported by substantial evidence is not what the AFBCMR would believe on a *de novo* appraisal, but whether the administrative determination is supported by documented facts and events in the records. In their opinion, there is substantial, credible evidence in the record to legally support the Article 15 action. The mere fact of a different conclusion on the ultimate issue in a subsequent administrative forum is of no consequence, particularly since different evidence was presented in each proceeding. Had applicant demanded a trial by court-martial, it would only be speculation to conclude he would have been acquitted, even with different evidentiary rules and a higher burden of proof on the government. Counsel's letter, dated 21 June 1994, indicates that applicant made an informed decision based upon a critical analysis of his situation and with the advice of counsel. Therefore, they recommend denial of the relief sought by applicant.

A complete copy of the evaluation is attached at Exhibit E.

The Chief, BCMR and SSB Section, AFPC/DPPPAB, reviewed the application with respect to the EPRs. They state that they do not concur with applicant's contention that the 23 October 1993 EPR was written by the wrong evaluator. The rater on the report states he was directed to sign the EPR, which he did. He assigned a "5." The rating was downgraded to a "3" by the indorser, and referred to applicant. It is not within the rater's discretion to decide the indorser's rating or comments. Neither the indorser or the reviewing commander is heard from. Their concurrence with the rater regarding his claims is necessary in this appeal. Applicant has failed to provide evidence proving the 23 October 93 EPR is factually inaccurate or derived from injustice. It is logical that applicant's documented misconduct during the rating period would be reflected on the EPR.

Applicant provides no documentation regarding his request to change his grade on the 24 July 1994 EPR. He was reduced to A1C on 30 June 1993, and had to serve at least 20 months in that grade prior to being eligible for promotion to sergeant. It is only 13 months from 30 June 1993 to 25 July 1994, so applicant was not eligible for promotion to sergeant when the 25 July 1994 EPR was closed out. They are provided no evidence that the 24 July 1994 is factually inaccurate or the product of injustice. Therefore, they recommend denial of applicant's requests,

A complete copy of the evaluation is attached at Exhibit F.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Applicant reviewed the Air Force evaluations and states that, with respect to the opinions from AFPC/JA and AFLSA/JAJM, in every letter it seems he is guilty as charged for acceptance of

the Article 15 procedures; secondly, he is guilty because of a failure of the polygraph examination. Both statements, according to the opinions, is an admission of guilt and therefore denied his request for set-aside. The informed decision he took from his lawyer was that "Once the serology report comes back, it will prove your innocence, why go through with a court-martial?, let's be done with it and you will be back at work in no time." He trusted his lawyers and did not have the money to fly a civilian lawyer over to England, I was stuck with them." Further, when he asked for a lawyer during the OSI questioning, they stopped questioning him. He was never asked with whom he was having a relationship. His girlfriend wrote a letter stating that they had a heterosexual relationship. It's true that he did not have an excuse for not reporting the incident to authorities. Embarrassment is not an excuse, he admits. He would feel it would be hard to believe, also; but that is the way it happened. He believes that if he had been at the other airman's discharge board, a different outcome would have occurred. The other airman was at his discharge board and the outcome was different.

Regarding the EPR opinion, he states that the EPR was manufactured to suit a purpose and that purpose is now a record. The record is wrong and so the EPR is wrong; the EPR is invalid and needs to be removed. He objects to the author of the opinion including information about his "2" EPR, dated over three years after the incident in question. He has made mistakes in his career, and took the punishment without question. He is not a lawyer, nor does he claim to be, he is just one person and the only expertise he has is that he was a victim in this entire situation. He is only one person against a mass of judges, juries, boards, and a very large institution. He understands that this would be a hard road to fight and accepts this and will press on with his daily life knowing the truth.

Applicant's complete response is attached at Exhibit H.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.

2. The application was timely filed.

3. Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice warranting partial relief. After thoroughly reviewing the evidence of record, we are persuaded that the contested Article 15 was inconsistent with the findings of the Administrative Discharge Board (ADB). In most situations, we would normally be persuaded that the commander was in the best position to assess the circumstances; however, in the instant case, the commander did not wait to consider the serology report which eliminated the

other airman as the contributor to the staining on the tested material. Clearly, the commander had sufficient evidence to support his action at the time he imposed the Article 15 punishment. However, once the commander reviewed the serology report and the results of the ADB, we do not understand why he refused to set aside the Article **15.** In our opinion, the benefit of the doubt should have been resolved in the applicant's favor. Therefore, although the applicant is no longer on active duty, we believe that it would be an injustice for him to possibly continue to suffer the effects of what is maintained in his military records regarding this incident. In view of the foregoing, we recommend that his records be corrected to the extent indicated below. Applicant's requests to be considered for retroactive promotion consideration to the grade of staff sergeant and reinstatement to active duty are duly noted. However, after thoroughly reviewing his complete military record, noting his promotion to the grade of staff sergeant in 1995, and his separation in 1996, we are not persuaded that it would be in the best interests of the Air Force to provide him any further relief. Our recommendations are solely intended to clear applicant's record regarding this incident and in no way absolve him from the misconduct for which he was eventually separated. We do not condone this misconduct and while applicant is not requesting the referral EPR closing 21 August 1996 be removed from his records, we wish to make it absolutely clear that we believe this report accurately reflected his performance during the time period.

THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that:

a. The punishment imposed on him under the provisions of Article 15, Uniform Code of Military Justice (UCMJ), on 30 June 1993, be set aside and expunged from his records, and all rights, privileges, and property of which he may have been deprived be restored.

b. Any and all documentation pertaining to his permanent decertification from the Personnel Reliability Program (PRP), the withdrawal of his authority to bear firearms, and the issuance of temporary identification cards, be removed from his records.

c. The Enlisted Performance Report (EPR), AF Form 910, rendered for the period 24 October 1992 through 23 October 1993, be declared void and removed from his records.

d. AF Form 418, Selective Reenlistment Program Consideration, dated 25 April 1994, and signed by Lieutenant Colonel Robert F. Byrd, be declared void and removed from his records.

e. The letter, dated 29 April 1994, and signed by Captain [redacted] be declared void and removed from his record.

f. Block 3, Grade, on the EPR, AF Form 910, rendered for the period 24 October 1993 through 25 July 1994, be amended to reflect "Sgt" vice "A1C."

The following members of the Board considered this application in Executive Session on 13 May 1998, under the provisions of AFI 36-2603:

Mr. Vaughn E. Schlunz, Panel Chair
Mr. Michael P. Higgins, Member
Mr. Kenneth L. Reinertson, Member

All members voted to correct the records, as recommended. The following documentary evidence was considered:

Exhibit A. DD Forms 149, dated 22 Jun 94 and 5 Aug 96, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, AFLSA/JAJM, dated 2 Jan 97.
Exhibit D. Letter, AFPC/DPPAES, dated 13 Feb 97.
Exhibit E. Letter, AFPC/JA, dated 15 Apr 97.
Exhibit F. Letter, AFPC/DPPAB, dated 12 May 97.
Exhibit G. Letter, AFBCMR, dated 5 May 97.
Exhibit H. Applicant's Response, dated 21 May 97.
Exhibit I. AFOSI Report of Investigation, withheld.

VAUGHN E. SCHLUNZ
VAUGHN E. SCHLUNZ
Panel Chair

DEPARTMENT OF THE AIR FORCE
WASHINGTON, D.C.

JUL - 11998

Office of the Assistant Secretary

AFBCMR 94-02889

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Air Force Board for Correction of Military Records and under the authority of Section 1552, Title 10, United States Code (70A Stat 116), it is directed that:

The pertinent military records of the Department of the Air Force relating to [redacted] be corrected to show that:

a. The punishment imposed on him under the provisions of Article 15, Uniform Code of Military Justice (UCMJ), on 30 June 1993, be, and hereby is, set aside and expunged from his records, and all rights, privileges, and property of which he may have been deprived be restored.

b. Any and all documentation pertaining to his permanent decertification from the Personnel Reliability Program (PRP), the withdrawal of his authority to bear firearms, and the issuance of temporary identification cards, be, and hereby are, removed from his records.

c. The Enlisted Performance Report (EPR), AF Form 910, rendered for the period 24 October 1992 through 23 October 1993, be, and hereby is, declared void and removed from his records.

d. AF Form 418, Selective Reenlistment Program Consideration, dated 25 April 1994, and signed by [redacted] be and hereby is, declared void and removed from his records.

e. The letter, dated 29 April 1994, and signed by [redacted], be and hereby is, declared void and removed from his record.

f. Block 3, Grade, on the EPR, AF Form 910, rendered for the period 24 October 1993 through 25 July 1994, be amended to reflect "Sgt" vice "A1C."

JOE G. LINEBERGER
Director
Air Force Review Boards Agency