RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

AUG 14 1998

IN THE MATTER OF: [redacted]

DOCKET NUMBER: 97-01631

COUNSEL: [redacted]

HEARING DESIRED: Yes

APPLICANT REQUESTS THAT

His under-other-than-honorable conditions (UOTHC) discharge for misconduct on 20 September 1995 be changed to a length-of-service (LOS) retirement.

APPLICANT CONTENDS THAT:

On the day he was discharged he had completed approximately 23 years and 4 months of active duty and was entitled to retirement benefits. He was never afforded an opportunity to rebut the incorrect and incomplete information presented to the Secretary of the Air Force (SAF). The Air Force interfered with the civilian judicial system. Denial of his retirement is excessive punishment by the Air Force for a civilian wrong.

Counsel submits in a supplemental argument that applicant's legal rights were violated at the Administrative Discharge Board (ADB) because the legal advisor failed to allow the defense counsel to explain to the ADB members the affect of their decision [separation] upon the applicant's retirement benefits. The case of US v. Greaves has a bearing on this appeal. While it is recognized that an ADB is not a court-martial, the gravity of the decision of the [ADB] to deny this applicant retirement benefits is of such a magnitude that it calls for the same stringent due process rights which are applicable in a court-martial. [In the Greaves case], the court specifically found that a judge cannot minimize matters in mitigation before sentence. In the instant case, the legal advisor did exactly that by refusing to allow the defense attorney to argue the point concerning retirement. This was plain error and tantamount to denying the applicant a fair hearing during the "sentencing portion" of the ADB. If the members had been aware that their decision effectively precluded the applicant from receiving retirement benefits based on 22 years of service, they might have voted to retain him.

Copies of applicant's/counsel's complete submissions are attached at Exhibit A.

STATEMENT OF FACTS:

The applicant entered active duty on 12 May 1972. During the period in question, he was a master sergeant (Date of Rank: 1 Apr 87) assigned to the [redacted] Airlift Squadron, [redacted]. He was 39 years old and had reenlisted for three years on 19 November 1992. His performance reports from 1985 through 1992 reflect ratings of 9, 9, 9, 9, 4 (New System), 3, 4, and 4.

While at a bar on 27 January 1993, applicant was introduced to the victim by a male acquaintance known by the victim. Her friend and the applicant followed her home because she was having car trouble. The friend returned the applicant to his car at the bar. Applicant then returned to the victim's home with a six-pack of beer and a handgun. Applicant allegedly put a substance in the victim's beer to make her "groggy." Applicant became angry, made verbal threats, grabbed the victim by the hair, shoved her to the floor and forced her to orally copulate him, then forcibly sodomized her. Victim reported the incident. On 28 January 1993, the [redacted] Sheriff's Department ([redacted]SD) contacted Detachment 317, [redacted] for assistance in identifying the applicant, who had been identified by name by the victim. On 5 February 1993, the victim identified the applicant as the individual who raped her. Applicant was arrested. He consented to having his home searched. A weapon determined to be fully automatic and illegally possessed by him was seized. Applicant refused to answer questions and requested legal counsel. He was confined at the [redacted] Detention Center pending trial charges of forcible oral copulation, rape, sodomy and burglary. On 5 March 1993, he was arraigned on these charges. As part of the plea bargain arrangement with the [redacted] District Attorney, applicant pleaded *nolo contendere* (no contest) to sexual battery and first degree residential burglary with possession of a firearm. An additional element of the plea bargain was dismissal of three remaining felony charges. On 24 May 1993, following his agreement with a *nolo contendere* plea, applicant was sentenced to five years in state prison, less credit for time spent in custody prior to sentencing.

[According a Declaration provided by the applicant's attorney at that time (Exhibit **A**), *he and the applicant had negotiated a plea bargain agreement to enter nolo contendere pleas to several felony offenses in exchange for a guarantee of probation, up to one year in the [redacted] Jail, and no imposition of a state prison sentence. The former attorney adds that in a private conference in the court's chambers on the date* ***of*** *sentencing, two members* ***of*** *the Air Force Judge Advocates Office opposed the plea bargain agreement. The court ultimately rejected the plea bargain and the applicant had to either allow the matter to transfer to the Air Force's jurisdiction for prosecution or renegotiate the plea bargain agreement. He contends there was no new evidence and the rejection of the original plea agreement was based solely on the influence exerted upon* ***it*** *by military members.]*

On 14 September 1993, applicant's commander advised him that she was recommending him for a UOTHC discharge for his conviction of first degree burglary and sexual battery. After consulting with counsel, applicant initially requested a board hearing but then submitted a conditional board waiver contingent upon his receipt of a general discharge, which was denied. His application to retire in lieu of discharge was returned to him.

An ADB was convened on 30 November 1993 to determine whether the applicant should be discharged prior to the expiration of his term of service because of a civilian conviction. Applicant could not attend due to his incarceration,but he submitted a personal statement, and was represented at the board by counsel. The board recommended applicant be give an UOTHC discharge without probation and rehabilitation.

The HQ [redacted] Airlift Wing Staff Judge Advocate (JA) provided a legal review on 19 January 1994, indicating that procedures had been complied with and that the findings of the board were supported by a preponderance of the evidence record. Approval of a UOTHC discharge was recommended. The HQ [redacted] Airlift Wing commander also recommended approval.

After further legal review, the [redacted] AF/JAC recommended on 8 February 1994 that the board's findings and recommendations be approved. The 15th AF commander approved the findings on 9 February 1994.

On 8 March 1994, the HQ Air Mobility Command (AMC) JA found the case legally sufficient to support discharge and recommended applicant's request to retire in lieu of discharge be denied.

On 25 December 1993, applicant requested retirement effective 31 March 1994. On 22 December 1994, the SAF, through the Office of the Secretary Personnel Council (SAFPC), declined to accept applicant's request for retirement.

Applicant was separated in the grade of master sergeant with a UOTHC discharge for misconduct on 20 September 1995 and given an RE code of "2B." His DD Form 214 was administratively corrected to reflect that, due to his lost time (5 Feb 93 thru 12 Sep 95), he had 20 years, 9 months and 1 day of active service, rather than 23 years, 4 months, and 9 days.

AIR FORCE EVALUATION:

The Retirements Branch at HQ AFPC/DPPRR reviewed this appeal and states that the recommendation by applicant's commander for discharge for civilian conviction was found legally sufficient. Applicant was afforded to opportunity to request retirement in lieu of the UOTHC discharge. The SAF declined to accept applicant's application for retirement. There are no provisions

to allow payment of retired pay unless the member has met all requirements to receive such pay. The governing law for enlisted retirements (Title 10, USC, Section 8914, states that ". . . an enlisted member of the Air Force who has at least 20, but less than 30, years of service computed under Section 8925 of this title may, upon his request, be retired." Applicant's request for retirement in lieu of discharge was denied by competent authority (the SAF). As there are no errors or irregularities, the author recommends denial.

A copy of the complete Air Force evaluation, with attachments, is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Counsel rebutted, indicating that the evaluation is nothing other than a bald and unsupported opinion that the relief requested should be denied. There is no response whatsoever to the legal, factual and equitable arguments put forth by the applicant. Even with applicant's lost time, he had in excess of 20 years of honorable service which qualifies him for retirement.

A copy of counsel's complete response is at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION:

The Senior Attorney-Advisor, HQ AFPC/JA, evaluated this appeal and summarizes that review of applicant's civilian convictions and resulting discharge and denial of retirement fails to show applicant was unjustly or improperly treated. Applicant's loss of retirement was an administrative consequence of his criminal misconduct and was not additional punishment for his crimes. The SAF's decision to deny him a military retirement is entirely appropriate. The appeal should be denied in its entirety.

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

APPLICANT'S REVIEW OF THE ADDITIONAL AIR FORCE EVALUATION:

Counsel reviewed the additional evaluation and found it rather adversarial. He provides a five-page rationale for why he believes the Board should disregard the advisory opinion of the Senior Attorney Advisory. The applicant has paid the price for his alleged misconduct. A lifetime forfeiture is not warranted in a situation in which the civilian court system has already punished him.

A copy of counsel's complete response is 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. 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 his UOTHC discharge should be changed to an LOS retirement. Counsel's numerous contentions made in behalf of his client were duly considered; however, we do not find these assertions, in and by themselves, sufficiently persuasive to override the rationale provided by the Air Force. Counsel's citing of the Greaves case is not applicable to the instant appeal. It appears from both the applicant's own statement to the ADB and the ADB transcript that the board was fully cognizant of applicant's more than 20 years of service, his retirement eligibility, and his desire to retire. However, it is not within an ADB's purview to determine whether or not a member will be allowed to retire. An ADB is merely an administrative procedure to determine if a member's employment by the Air Force should be continued and, if not, the character of discharge. There is no "sentencing portion" in an ADB. Following an ADB, the application for retirement of a retirement-eligible member can only be rejected within the Secretariat. Congress empowered the service secretaries to decide whether a member's service warrants the award of a military retirement. Under the applicable law, the only entitlement a military member with a minimum of 20 but less than 30 years of service has with respect to retirement is the opportunity to request to be retired. Applicant's loss of retirement was not ''punishment'' it was the administrative consequence of his egregious misconduct. Counsel's and applicant's contentions that the Air Force's "interference" with his plea bargaining was inappropriate and that the SAF's decision to deny his application for retirement was based on incomplete/erroneous information have not been substantiated by the available evidence. These and the remaining issues have been sufficiently addressed by the Air Force evaluations. We therefore agree with the recommendations of the Air Force and adopt the rationale expressed as the basis for our decision that the applicant has failed to sustain his burden that he has suffered either an error or an injustice. In view of the above and absent persuasive evidence to the contrary, we find no compelling basis to recommend granting the relief sought.

4. The documentation provided with this case was sufficient to give the Board a clear understanding of the issues involved and a personal appearance, with or without legal counsel, would not

have materially added to that understanding. 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 14 July 1998, under the provisions of AFI 36-2603:

Ms. Patricia J. Zarodkiewicz, Panel Chair
Mr. Loren S. Perlstein, Member
Mr. Dana J. Gilmour, Member

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 19 May 97, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, HQ AFPC/DPPRR, dated 23 Sep 97, w/atchs.
Exhibit D. Letter, AFBCMR, dated 13 Oct 97.
Exhibit E. Letter, Counsel, dated 17 Dec 97.
Exhibit F. Letter, HQ AFPC/JA, dated 31 Mar 98.
Exhibit G. Letter, AFBCMR, dated 20 Apr 98.
Exhibit H. Letter, Counsel, dated 28 May 98.

PATRICIA J. ZARODKIEWICZ
Panel Chair