

TYPE - UOTHC		PERSONAL APPEARANCE		X RECORD REVIEW									
COUNSEL		NAME OF COUNSEL AND OR ORGANIZATION			ADDRESS AND OR ORGANIZATION OF COUNSEL								
YES	NO												
	X												
MEMBERS SITTING							VOICE OF THE BOARD						
							HON	GEN	UOTHC	OTHER	DENY		
[REDACTED]												X	
[REDACTED]												X	
[REDACTED]												X	
[REDACTED]												X	
[REDACTED]												X	
ISSUES A94.05, A92.37, A01.13		INDEX NUMBER A73.00			EXHIBITS SUBMITTED TO THE BOARD								
					1	ORDER APPOINTING THE BOARD							
					2	APPLICATION FOR REVIEW OF DISCHARGE							
					3	LETTER OF NOTIFICATION							
HEARING DATE 02-10-01		CASE NUMBER FD2002-0168			4	BRIEF OF PERSONNEL FILE							
						COUNSEL'S RELEASE TO THE BOARD							
						ADDITIONAL EXHIBITS SUBMITTED AT TIME OF PERSONAL APPEARANCE							
						TAPE RECORDING OF PERSONAL APPEARANCE HEARING							
APPLICANT'S ISSUE AND THE BOARD'S DECISIONAL RATIONALE ARE DISCUSSED ON THE ATTACHED AIR FORCE DISCHARGE REVIEW BOARD DECISIONAL RATIONALE													
REMARKS Case heard at Washington, D.C. Advise applicant of the decision of the Board, the right to a personal appearance with/without counsel, and the right to submit an application to the AFBCMR.													
SIGNATURE OF RECORDER [REDACTED]						SIGNATURE OF BOARD PRESIDENT [REDACTED]							
INDORSEMENT						DATE: 02-10-01							
TO: SAF/MIBR 550 C STREET WEST, SUITE 40 RANDOLPH AFB, TX 78150-4742						FROM: SECRETARY OF THE AIR FORCE PERSONNEL COUNCIL, AIR FORCE DISCHARGE REVIEW BOARD 1535 COMMAND DR, EE WING, 3 RD FLOOR ANDREWS AFB, MD 20762-7002							

AIR FORCE DISCHARGE REVIEW BOARD DECISIONAL RATIONALE

CASE NUMBER

FD2002-0168

GENERAL: The applicant appeals for upgrade of discharge to Honorable.

The applicant was offered a personal appearance before the Discharge Review Board but declined to exercise this right.

The attached brief contains available pertinent data on the applicant and the factors leading to the discharge.

FINDINGS: Upgrade of discharge is denied.

The Board finds that neither the evidence of record or that provided by applicant substantiates an inequity or impropriety that would justify a change of discharge.

Issues. Applicant received an Under Other Than Honorable Conditions (UOTHC) discharge pursuant to his request to be discharged in lieu of trial by court martial, for dereliction of duty, false swearing, and carnal knowledge. Member had a previous Letter of Reprimand for an unprofessional relationship with a dependent female under the age of 18, and an Article 15 for failing to refrain from having unescorted female minors in his dormitory room. Member had been well forewarned the restrictions against having such relationships with young dependent females, yet persisted, resulting in the court martial charges. The Board concluded member's misconduct was an extremely significant departure from conduct expected of all military members, and member was well aware of the Air Force's policy in this area. The Board further notes that applicant voluntarily submitted his request for discharge in lieu of trial by court martial, thus not attempting to establish his innocence, and in doing so acknowledged his characterization of service could be deemed under other than honorable conditions; in accordance with discharge regulations, airmen discharged under these circumstances usually do have their service characterized as UOTHC. The Board found no wrongful action by the Air Force, and finds the discharge proper and without basis for upgrade.

CONCLUSIONS: The Discharge Review Board concludes that the discharge was consistent with the procedural and substantive requirements of the discharge regulation and was within the discretion of the discharge authority and that the applicant was provided full administrative due process.

In view of the foregoing findings the board further concludes that there exists no legal or equitable basis for upgrade of discharge, thus the applicant's discharge should not be changed.

Attachment:
Examiner's Brief

DEPARTMENT OF THE AIR FORCE
 AIR FORCE DISCHARGE REVIEW BOARD
 ANDREWS AFB, MD

(Former SRA) (HGH SRA)

1. **MATTER UNDER REVIEW:** Appl rec'd a UOTH Disch fr USAF 02/02/08 UP AFI 36-3208, para 4.3 (Discharge in Lieu of Trial by Court-Martial). Appeals for Honorable Disch.

2. **BACKGROUND:**

a. DOB: 80/01/19. Enlmt Age: 17 11/12. Disch Age: 22 0/12. Educ: HS DIPL. AFQT: N/A. A-30, E-62, G-52, M-20. PAFSC: 1N251 - Signals Intelligence Production. DAS: 99/10/27.

b. Prior Sv: (1) AFRes 97/12/20 - 98/09/15 (8 Mos 26 Days) (Inactive).

3. **SERVICE UNDER REVIEW:**

a. Enlisted as AB 98/09/16 for 4 yrs. Svd: 3 Yrs 4 Mo 23 Das, all AMS.

b. Grade Status: SRA - 01/03/01
 A1C - 98/10/31

c. Time Lost: None.

d. Art 15's: (1) 00/08/22, Misawa AB, Japan - Article 92. You, who knew or should have known of your duties, on divers occasions, from on or about 29 Apr 2000 to on or about 27 May 2000, were derelict in the performance of those duties in that you willfully failed to refrain from allowing unescorted minors in your dormitory room, as it was your duty to do. Suspended reduction to the grade of AMN, forfeiture of \$200.00 pay per month for 2 months, and 30 days extra duty. (No appeal) (No mitigation).

e. Additional: None

f. CM: None

g. Record of SV: 98/09/16 - 00/04/15 Misawa AB 5 (Dir HAF)
 00/04/16 - 01/04/15 Misawa AB 3 (Annual) REF

(Discharged from Misawa AB)

h. Awards & Decs: AFTR.

i. Stmt of Sv: TMS: (4) Yrs (1) Mos (19) Das

TAMS: (3) Yrs (4) Mos (23) Das

4. BASIS ADVANCED FOR REVIEW: Appln (DD Fm 293) dtd 02/04/04.
(Change Discharge to Honorable)

ISSUES ATTACHED TO BRIEF

ATCH

1. Applicant's Issues

02/07/29/cr

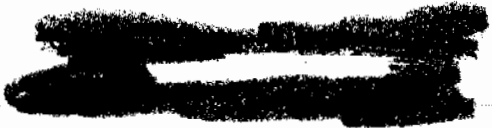
I feel my discharge should be upgraded because the girls in my case had a history of lying to older guys and sleeping with them. These two girls had lied to at least five other service members and after they were caught they kept doing it. I lied to OSI because they told me that if I did not make another statement admitting that I knew the ages of the girls I would be charged with making false government statements. They also said that I would be in a lot more trouble as a result of this. I was scared because this was the second time something of this nature happened to me. The first time I passed a polygraph to clear up everything, but when I took the polygraph this time I was so scared and nervous because I thought no one believed my story, because this was the second time I got caught in this situation, that I could not relax. That is the reason I failed the polygraph which led to me making the other statements.

I am asking you to review my case and upgrade my discharge because this incident has already taken away something that was very important to me, and that was serving in the United States Air Force. I am no longer in the Air Force because of this and that really hurts me because I really loved my job.

I am presently trying to enroll in college so I can become a productive US citizen again. It will help me do that if

you would review my case and upgrade my discharge. I would really like the chance to become the US citizen I started to be when I joined the Air Force. To further help me become a better person I discuss my case with my mother and the pastor at my church and they help me realize where I went wrong.

I would like to say thank you for your time and consideration.



after he had sex a couple of times with her, he received some information that caused him to question whether she was underage, but he didn't want to believe the information and didn't question her about her age because "the sex was real good." Thereafter, he had consensual sex with [REDACTED] on two more occasions even though he was aware she might be underage. The two "dereliction of duty" specifications pending against the accused concern his failure to comply with dormitory visitation rules that prohibit having guests under the age of 18 visit dorm rooms. The accused knew of this prohibition because he received an Article 15 in Aug 00 for committing the same offense by having sex with another 13-year old dependent daughter in his dorm room in May 00.

3. LEGAL SUFFICIENCY: The evidence is legally sufficient to support the requested discharge. The Manual for Courts-Martial authorizes a punitive discharge for each of the specifications pending against [REDACTED]. Therefore, the criteria set forth in AFI 36-3208, para 4.1 are satisfied and [REDACTED] may be discharged pursuant to his request.

4. MATTERS FOR THE ACCUSED:

a. The accused is a single, 22-year old, first-term airman who's been in the Air Force since 16 Sep 98. He was assigned to the 301st Intelligence Squadron on 27 Oct 99 and is entitled to wear the Air Force Training Ribbon. The accused's first Enlisted Performance Report (EPR), which closed out 15 Apr 00, rated his overall performance a "5". However, his most recent EPR, which closed out 15 Apr 01, was a "referral" report with an overall rating of "3". The accused received an Article 15 on 4 Aug 00 for dereliction of duty after he allowed an unescorted minor in his dorm room on multiple occasions. On 8 Feb 00, he received a letter of counseling for having an unprofessional relationship with dependents under 18 years of age.

b. The accused's counsel submitted a 3-page memo in support of the Chapter 4 request. In the memo, defense counsel cites six reasons for approving his client's request. Most persuasive is the first reason he cites - problems with the prosecution's main witness, [REDACTED]. Her testimony will be needed to corroborate the accused's confession regarding the carnal knowledge charge and one of the dereliction of duty specifications. [REDACTED] who is now living with her family at Hill AFB, has made it clear she has no desire to return to Misawa to testify against the accused. There's also some question whether she'd cooperate with efforts to depose her in the States if the government attempted to secure her testimony via that route. [REDACTED] also has a less than stellar reputation for truthfulness, and like her friend, [REDACTED], who departs Misawa for the States later this month, is a fairly unsympathetic victim. Defense counsel also suggests litigating this case would envelope the base schools at Misawa in a swirl of rumor, controversy and turmoil and the prosecution would have to respond to defense motions challenging the admissibility of the accused's statements. He also contends the government would risk possible reversal on appeal if it proceeds to trial at this point because of certain unspecified circumstances surrounding the case that have prejudiced the accused. (Defense counsel is presumably alluding to an ineffective assistance of counsel issue that gave rise to the accused releasing his original defense counsel and being assigned new counsel.) Defense counsel contends approving his client's request is also a matter of equity as several other airmen who allegedly had sex with [REDACTED] only received Article 15 or lesser forms of disciplinary or administrative actions against them. He also notes several other individuals in Japan and PACAF who faced carnal knowledge charges within the last year and a half were granted discharges in lieu of court-martial. Lastly,

he argues there's no guaranty the accused would receive a punitive discharge if his case went to trial and he is convicted. He argues approving the accused's discharge request with a UOTHC discharge would impose a heavy penalty on the accused, get him out of the service quickly and be consistent with maintaining good order and discipline in the 301st IS.

5. DISCUSSION:

a. Under normal circumstances, the charges and facts of this case would warrant trial by court-martial, particularly given the fact that the accused had previously been punished under Article 15 for having another underage dependent in his dorm room. However, there are a number of factors that warrant an alternate disposition in this case. As noted above, availability of [REDACTED] and [REDACTED] will be a major hurdle if this case goes to trial. Both girls and their families have repeatedly vacillated over whether they would cooperate with the government in prosecuting the accused. Currently, neither girl is willing to return to Misawa to testify against the accused; nor are their parents willing to intercede on the government's behalf. A court-martial has no authority to subpoena civilian witnesses to testify in judicial proceedings outside the United States. Therefore, the only way to secure the testimony of the girls would be to conduct a stateside deposition. However, that would be time-consuming and costly, as trial counsel, defense counsel and the accused would need to travel to the U.S. for the deposition. There's also no guaranty the girls would cooperate at the deposition, assuming they even appear. While it's possible to prosecute a "victim-type" crime without the victim, it can make proving the offense more difficult and result in a lesser sentence for the accused. Credibility concerns with both girls shouldn't impact the prosecution's ability to prove the charged offenses, assuming the girls' testimony can somehow be secured, but it may well result in a lesser sentence if it appears the girls lied to the accused in order to have sex with him as they did with a number of other airmen living in the dorms. (The evidence seems to indicate this is the case.) But for the accused's post-polygraph admission that he had sex with [REDACTED] after learning she was underage, the government likely wouldn't be able to prove the carnal knowledge charge in the case.

b. Equity also supports approving the accused's discharge request. The carnal knowledge charge is the main impetus for court-martial action in this case. Absent that offense, this case would likely have resulted in nonjudicial punishment and discharge, even though the accused was previously punished for having an underage girl in his dorm room. While carnal knowledge rightfully warrants criminal sanction, the seriousness of the offense can vary depending on the circumstances of the case. Neither [REDACTED] or [REDACTED] was an innocent "victim" who the accused seduced into having sex with him. The evidence suggests they were the instigators of the resulting sexual relationship. It also appears the accused wasn't either girl's first sexual partner. While this by no means excuses the accused's conduct (consensual carnal knowledge is still a crime), it lessens to some extent the seriousness of the offense and calls into question whether the accused should be prosecuted for his actions or disciplined in some other manner and "fired" from the Air Force. Ordinarily this is a matter best left for the fact finder to consider in determining how to punish an accused's conduct. However, given the significant witness availability concerns present here, it's another factor, in my opinion, that supports approving a discharge in lieu of court-martial.

c. The other matters cited by defense counsel shouldn't affect the prosecution's ability to prove the charges if the case proceeds to trial, but they may impact the sentence adjudged. If trial counsel can get over the corroboration hurdle, admitting the statements the accused gave to OSI shouldn't be a problem. Nor should any possible ineffective assistance of counsel claim be a concern since new counsel (not the defense counsel who allowed the accused to take an OSI polygraph and submit to a post-test interview) now represents the accused. While the accused is the only airman who had sex with either [REDACTED] to be prosecuted for carnal knowledge, that's not a legal defense to the charge. (The other airmen received nonjudicial punishment because the government couldn't prove beyond a reasonable doubt they knew the girls were underage when they had sex.) However, if that fact is brought to the attention of the fact finder during sentencing, as it likely will in the accused's unsworn statement, it may result in a lesser sentence. While it's rarely possible to predict with accuracy the sentence that will be adjudged in a given case, there's a good possibility the accused may not receive a punitive discharge, even if he's convicted of all three charges. Should that happen, his unit would then have to take action to administratively separate him once he gets out of confinement. Service regulations may also limit the service characterization to no worse than a general under honorable conditions. Standing alone, that's not reason to approve a Chapter 4 request. However, in this case, it's another factor that weighs in favor of discharging the accused in lieu of trial by court-martial.

6. OPTIONS: As the approval authority in this case, you may:

a. Disapprove the request and return the case to 35 FW/CC with appropriate comments; or

b. Approve the request and determine the type of discharge to be issued. Although "in lieu of" discharges generally result in a UOTHC service characterization, you may also approve an honorable or general (under honorable conditions) discharge in this case. However, if you approve any characterization other than a UOTHC discharge, you must give reasons for your decision.

7. RECOMMENDATION: I recommend you accept [REDACTED] request for discharge in lieu of trial by court-martial and direct that he be separated from the Air Force with a UOTHC discharge.

[REDACTED]

I have reviewed the request for discharge in lieu of court-martial and the supporting documents and concur with the above advice and recommendations.

[REDACTED]



DEPARTMENT OF THE AIR FORCE
PACIFIC AIR FORCES

FD2002-0168

7 January 2002

MEMORANDUM FOR 35 FW/CC

FROM: 35 FW/JA

SUBJECT: Legal Review of Request for Discharge in Lieu of Trial by Court-Martial,
██████████, 301st IS (ACC), Misawa AB, Japan

██████████ has requested discharge in lieu of trial by court-martial pursuant to AFI 36-3208, Chapter 4, paragraph 4.3. His command, ██████████, recommends the request be approved. We concur with ██████████ recommendation.

2. **HISTORY:** On 28 Dec 01, ██████████ Commander, 301st Intelligence Squadron, preferred one charge with two specifications against ██████████ for being derelict in his duties by having minor dependents in his dormitory room on divers occasions, a violation of Article 92 of the UCMJ; a second charge for committing carnal knowledge, a violation of Article 120 of the UCMJ; and a final charge for false swearing, a violation of Article 134 of the UCMJ. On the same day as the preferral of charges ██████████ presented 301st IS/CC with a request for discharge in lieu of trial by court-martial (a.k.a. "Chapter 4 request").

3. **LEGAL SUFFICIENCY** ██████████ is eligible to make a request for an administrative discharge under AFI 36-3208, paragraph 4.1.2, because he is charged with offenses for which a punitive discharge is authorized under the UCMJ, and the charges have been preferred.

4. **CHARACTERIZATION OF DISCHARGE:** According to AFI 36-3208, paragraph 4.2, the service of airmen discharged in lieu of trial by court-martial is generally characterized as Under Other Than Honorable Conditions (UOTHC). A UOTHC discharge is warranted in this case should ██████████ be administratively discharged, because of the serious nature of his misconduct.

5. **LENGTHY SERVICE PROBATION CONSIDERATION** ██████████ has served 39 months and is not entitled to lengthy service consideration.

6. **RECOMMENDATION OF THE COMMANDER** ██████████ commander, supports the request. He felt the severity of the charges dictated a court-martial being the proper forum. However, in light of the concerns raised by defense counsel that we discuss further below, he finds the interests of his squadron and the Air Force can be best served by approving the discharge request.

7. **RESPONDENT'S EVIDENCE:** ██████████ request for discharge in lieu of trial by court-martial, presented through his defense counsel, is premised upon six bases:

a) First, he emphasizes the problems with the Government's main witness, [REDACTED]

This argument is persuasive for two reasons. First, [REDACTED] is now residing with her sponsor/family in Hill AFB, Utah. Defense counsel is correct in noting that the United States has no authority to order her to come back to Japan to testify. Rather, given her reluctance to testify, the only option would be to subpoena her for a deposition in Utah. The time and expense of sending trial counsel and defense counsel to conduct such a deposition would be a significant cost to the government. Second, it is possible that [REDACTED] would be hostile to the Government in the deposition, which may result in relatively weak testimony. The expense and risks involved in holding a deposition are strong factors counseling in favor of acceptance of this offer.

b) Second, he opines about the potential effects a court-martial would have in bringing additional attention to the case within the local schools. This argument is not persuasive, especially in light of the fact that [REDACTED] now lives in Utah and therefore no longer attends the DoD school here on base. The second victim, [REDACTED] is expected to leave Misawa AB permanently later this month. If this was the sole concern raised by defense counsel, i.e., the potential effect on our schools, we would not see it as hindering our decision to prosecute an airmen for charges that [REDACTED] is presently facing.

c) Third, he discusses the intent to file pre-trial motions should the court-martial go forward wherein he will try to suppress the confessions made by his client to the AFOSI. This contention is not persuasive. On 15 Aug 01, after having had the benefit of conferring with defense counsel, [REDACTED] agreed to the OSI's request for another interview that day. Following a proper Article 31 rights advisement, [REDACTED] confessed to having committed carnal knowledge with [REDACTED]. We are therefore confident that we would prevail against any defense motion to suppress [REDACTED] confessions since they were given knowingly, voluntarily, and free of coercion. However, the concern about [REDACTED] confessions made on 15 Aug 01 is the amount of "corroboration," available to support use of his confessions at trial. MRE 304(g) states the rule on corroboration as follows: "[a]n admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth." In the recent case of *United States v. Baldwin*, 54 M.J. 464 (CAAF 2001), although the court noted that the inference required under the law need only be "slight," the facts in that case revealed a witness having seen the accused in the victim's bedroom thereby corroborating his subsequent confession that he molested his child. In the present case, if the two minor females are forced under subpoena at a deposition in the US to corroborate [REDACTED] confessions, they may give testimony contradictory to their prior statements. While the Government could use the victim's prior statements to impeach their testimony, there is a possibility that a judge or appellate court could find insufficient corroboration of the accused's confession to uphold a conviction. The certainty gained through this offer is desirable in this case.

d) Fourth, defense counsel suggests the possible reversal on appeal that could occur due to unstated factors. We assume this references [REDACTED] relationship with his prior defense counsel. We find this argument not persuasive. We identified that potential issue before charges were preferred to the Chief Circuit Defense Counsel who, in turn, offered [REDACTED] new counsel. As such, we feel that this corrective action would preclude grounds for a new trial and thus, negate the possibility of reversal on appeal.

e) Fifth, defense counsel points out "considerations of equity" indicating more favorable treatment has been shown towards other airmen who have committed similar offenses. We find this not persuasive in deciding whether or not to prosecute [REDACTED]. The need for good order and discipline in a given unit requires that we do not have a one-size-fits-all approach to the administration of military justice. Rather, the commander's decision to court-martial a particular airman must be based upon its own set of unique facts.

f) Finally, defense counsel properly notes that [REDACTED] can receive a UOTHC discharge by submitting this request. This is an appropriate characterization of the accused's service. If this Chapter 4 request is denied and a court-martial later does not adjudge a punitive discharge, then a UOTHC would not be guaranteed in a subsequent administrative discharge proceeding. That was the case in the most recent board hearing here at Misawa AB where a UOTHC recommendation was submitted to the board, with carnal knowledge being one of the key acts of misconduct. The board recommended that the airman should receive a general discharge with an offer of probation and rehabilitation. That is clearly not what the 301st Intelligence Squadron is seeking in this case.

8. **DISCUSSION:** [REDACTED] is charged with serious crimes under the UCMJ. The two female dependents involved were from two separate families. As [REDACTED] commander notes, [REDACTED] engaged in this misconduct while he was under suspended punishment under Art 15 for engaging in similar misconduct with a third young dependent. It is important to hold [REDACTED] accountable for his breach of the law in taking advantage of these young girls. However, the minor females involved have shown great reluctance in participating in the court-martial process. Therefore, we do not feel the victims' rights would be prejudiced by approving this Chapter 4 request, in light of the victims not demanding a trial take place. We have also noted the litigation risks for the Air Force if this case proceeds to trial. We do believe that trial by special court-martial was the appropriate forum for these offenses to be initially brought forward. However, based upon the aforementioned reasons, we find that approving the Chapter 4 request will be in the best interests of the United States Air Force.

9. **OPTIONS:** You may deny the request or recommend approval to 5 AF/CC, who takes final action on recommendations for approval.

10. **RECOMMENDATION:** 35 FW/CC sign the attached letter recommending 5 AF/CC approve the request for discharge in lieu of court-martial.

[REDACTED]