



## AIR FORCE DISCHARGE REVIEW BOARD DECISIONAL RATIONALE

**NOTE:** As an exception to policy, this is a non-personal appearance rehearing based on applicant's request to submit additional supporting information which was unavailable at the time of the initial records review conducted in July 2002. All of the additional documents were received and reviewed by the Discharge Review Board, as requested by the applicant, in arriving at its findings.

**GENERAL:** The applicant appeals for upgrade of discharge to honorable and to change the reason and authority for the discharge.

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, and change of reason and authority for, the discharge are denied.

The Board finds that neither the evidence of record nor that provided by the applicant substantiates an inequity or impropriety that would justify a change of discharge.

The applicant's issues are listed in the attached brief.

Issues 1, 2 and 6 are similar and will be addressed together. Applicant contends the discharge was improper because the Air Force failed to follow its own regulations and procedures regarding notification of and conduct of a Board of Inquiry (BOI), because applicant did not have adequate access to legal counsel or the evidence against him, because applicant did not properly submit a conditional or unconditional waiver to his right to a board hearing, and because certain dates referred to on the discharge documents are erroneous. The record reflects that from about October 1998 to May 2000, applicant engaged in an adulterous relationship with [REDACTED], a married woman not his wife. He used his government computer e-mail account extensively to exchange unofficial e-mails with her. After [REDACTED] asked applicant to leave her alone, he continued to contact her at her place of employment, church, and residence, in person, by phone, and by e-mail. This led [REDACTED] to obtain a peace order against applicant; when he violated it, [REDACTED] filed a Petition for Contempt. On July 11, 2000, applicant's commander gave him a written "no contact order" to refrain from all direct or indirect contact with [REDACTED]. Meanwhile, [REDACTED] obtained a permanent peace order against applicant. When he again violated it repeatedly, she filed a "stalking" complaint against him. Eventually applicant had received three separate "no contact orders" in three separate jurisdictions, including that given him by his commander. A Commander-Directed Inquiry was conducted from August 4 to September 7, 2000, regarding applicant's violation of his commander's written order as well as misuse of his government computer and violation of the civilian peace orders. The allegations against applicant were substantiated and were documented by several civilian arrest warrants, civilian criminal charges against him, and about 1500 e-mails. On October 3, 2000, applicant was arrested and committed to the Prince George's County, Maryland Detention Center on a no-bond status until January 11, 2001. On December 7, 2000, the Show Cause Authority (SCA) initiated administrative discharge for serious misconduct. There were four bases: 1) wrongful use of his government e-mail system, 2) wrongful sexual intercourse with [REDACTED] on multiple occasions between November 1998 and April 2000, 3) disobeying his commander's written "no contact order," and 4) violating the District Court of Maryland peace orders dated June 16, 2000 and July 26, 2000. (This was later amended to include a fifth basis, that being attempted stalking.) When notified of such on December 8, 2000, applicant refused to acknowledge receipt. An administrative discharge board was scheduled for December 2000, but was

delayed three times at defense counsel request, and was eventually set for March 26, 2001. In mid-January 2001, applicant was tried and convicted in civilian court and confined at Lorton, Virginia pending sentencing. Also in January 2001, a BOI date of March 20, 2001, was coordinated with applicant's defense counsel and agreed to, taking into consideration that respondent was due to be released from civilian confinement on March 13, 2001. On February 28, 2001, applicant submitted a conditional waiver of his entitlement to a board hearing conditioned on receipt of no less than a general discharge. On March 6, 2001, this request was rejected by the SCA. On March 13, 2001, applicant was sentenced by civilian authorities to 180 days confinement (120 days suspended), a \$50 fine, 2 years supervised probation, 100 hours of community service, and directed participation in a psychiatric treatment and rehabilitation program. On March 14, 2001, applicant's defense counsel requested the BOI date of March 20, 2001 be delayed again due to the counsel's scheduling conflict with another case. The week preceding the new BOI date of March 26, 2001, applicant sought admittance for psychiatric care at Walter Reed Army Medical Center. Nevertheless, his treating physician provided a memo stating he was competent and capable of appearing before the board on March 26, 2001. Furthermore, although applicant had been confined and hospitalized, he was able to communicate with his defense counsel and had over 2 months to prepare for the BOI. Various documents indicate the same military counsel represented applicant throughout the various proceedings. On March 22, 2001, applicant submitted an unconditional waiver of his right to a board hearing; he did so again orally on March 26, 2001, and it was orally accepted by the SCA on that date. On that document applicant notes he had access to military counsel, and the right to employ civilian counsel, as well as the possibility he may be discharged with a UOTHC characterization. On June 1, 2001, the Secretary of the Air Force's designee accepted applicant's unconditional waiver of his right to a board hearing and directed applicant be separated with an Under Other Than Honorable Conditions (UOTHC) discharge. This was effective on June 8, 2001. On June 4, 2001, one of the civilian jurisdictions where applicant was pending trial disposed of his case "Nolle Pros," which means they decided not to prosecute. All of these factors required detailed and thorough reviews at the time they were occurring, as well as by the Discharge Review Board. This process, then and now, was deliberative and fair. There was sufficient evidence to support the bases for discharge, which were very serious criminal misconduct, and warranted a UOTHC characterization. When the Secretary's designee made the final decision to execute the recommended UOTHC discharge in an instrument dated June 1, 2001, member properly received the required notice. Applicant and his defense counsel received full due process rights during the entire administrative discharge board proceedings. The Discharge Review Board could find no inequity or impropriety in the records or applicant's submissions to support applicant's contentions.

Issue 3. Applicant contends the discharge was inequitable because just prior to his BOI he was hospitalized and diagnosed with various mental health conditions, which rendered him unfit to participate in the BOI proceedings due to diminished capacity, and therefore unable to vigorously defend himself. As noted above, his treating physician provided a memo stating he was competent and capable of appearing before the board on March 26, 2001. This issue is without merit.

Issue 4. Applicant contends the discharge is inequitable because it is too harsh in view of his satisfactory career prior to the allegations that led to the discharge. Applicant noted an honorable period of service as an enlisted member, and recognition and awards for his performance as an officer. Applicant further contends the discharge was based on allegations favorably disposed of and adjudicated by a civilian court, and therefore provided an erroneous basis for discharge. The records do not support applicant's contention regarding a favorable disposition of civilian charges against him. He was convicted and sentenced in one jurisdiction; another disposed of the case "Nolle Pros," meaning that they decided not to prosecute, but the reasons are unknown. It does not necessarily imply applicant was exonerated. The conviction applicant did receive is sufficient justification for the commander's action, and the "Nolle Pros" disposition of the charges in the other jurisdiction do not effect the propriety of the discharge action. Furthermore, the records indicate that a different woman in a different state during a previous military assignment also had a protective order filed against applicant, indicating that earlier periods of service were not entirely

satisfactory. The Discharge Review Board noted the requirement to rely on the current period of service when characterizing someone's service, and the fact that even a single incident of serious misconduct may be the basis for a UOTHC discharge, in spite of other favorable factors. In this case, applicant was convicted of serious misconduct that overshadowed what might have been an otherwise satisfactory career. His disregard for Air Force policy and intentional criminal misconduct outweighed his duty performance. These factors were more aggravated by the member's grade and time in service. As a commissioned officer, his duties included leading by example and enforcing Air Force rules and regulations. Applicant betrayed the trust and confidence his supervisors had in him. The discharge was based on these factors and was therefore consistent with regulatory authority.

Issues 5 and 7. Applicant contends the discharge is improper because the Article 15 that formed a basis for discharge was improper. Applicant again claims he did not have reasonable access to defense counsel due to being "unlawfully confined in a civilian jail," and that the offenses contained in the Article 15 had been favorably judged by the civilian courts, thereby exposing him to "double jeopardy." He claims to be "exonerated" of the charges, and notes that the Air Force Board of Corrections to Military Records (AFBCMR) afforded him relief in his appeal to have "bad time" while in civilian confinement removed from his military record, citing it as an error or injustice. Applicant's contentions are unfounded. As noted above, there is nothing in the record to indicate applicant was exonerated of any charges, only that in one instance one jurisdiction chose not to prosecute for unknown reasons. There was also nothing in the record to show that applicant was unlawfully confined; he was confined because he violated a peace order on numerous occasions. At the time it occurred, the confinement was not unlawful. But even more importantly, the offenses listed on the Article 15 were separate and distinct from those pursued by the civilian jurisdictions. The Article 15 was for the misuse of the government computer, the adulterous relationship with [REDACTED], and for violating his commander's written order. While the AFBCMR found basis on which to grant relief regarding the restoration of lost time to applicant's military records, this action is separate and distinct from determining the equity or propriety of the administrative discharge proceedings. The AFBCMR did not consider any contentions in that regard and did not render any opinion on that particular matter. Furthermore, the discharge regulations clearly gave applicant's chain of command authority to recommend administratively discharging him based on unsuitability for further military service as a result of his serious misconduct. Facts and circumstances are different in each action and must be judged on a case-by-case basis. In doing so, a commander must consider the seriousness of the misconduct and how a member's retention might affect good order, discipline, and morale. They must focus on conduct during the current period of service, and also consider factors such as the member's age, length of service, grade, aptitude, and the standards of acceptable conduct and performance. The regulation provides for circumstances wherein even a single incident of misconduct may provide the basis for characterizing service, and a UOTHC is warranted when the behavior constitutes a significant departure from expected standards. Furthermore, regardless of the results of any military or civilian judicial proceeding, the discharge regulation still allowed for a member's service to be characterized as UOTHC after an administrative discharge board, and upon approval of the Secretary or his designee. All of these procedures were properly followed in the applicant's case. Administrative separation is a separate and distinct action apart from judicial proceedings; it is an action that severs the military status of an individual and characterizes his service, but is not the same as the punishment rendered by the judicial proceeding for his misconduct. Commission of serious criminal offenses clearly established applicant's unsuitability for further Air Force service.

Issue 8. Applicant contends the discharge is inequitable because it has rendered him completely unable to obtain satisfactory post-service employment; although reasonably well qualified for many positions, these have been denied based on his characterization of service, thus depriving applicant of the "dignity of self reliance" and placing an undue burden on him just to "survive." The Discharge Review Board recognized the impact the characterization of service may have had on applicant's post-service activities, however, this

evidence is not relevant to the period of service under review and therefore does not provide a basis for upgrade, and additionally, is insufficient to overcome the factors that were the basis for his discharge.

As a related matter, applicant cited four previous DRB cases, aspects of which he feels are similar to his own case, and wherein applicants in those cases received some relief from the DRB. Applicant states that the DRB found that merits of a former service member's record could be used as justification to upgrade a discharge to fully honorable status, as he believes was done in cases FD99-00322, FD00-00084, and FD01-00012. The Board found applicant's interpretation of these cases to be flawed in that each of these cases involved former enlisted members of the Air Force, none of whose offenses were similar to this applicant's. Furthermore, applicant's perception that a meritorious service record was justification for the relief granted is erroneous. In one case (FD99-00322), the Board granted relief based on inequitable treatment of the applicant during the disciplinary process. In the other two cases (FD00-00084 and FD01-00012), the Board granted relief due to an impropriety, namely that each of these two enlisted applicants was entitled to an administrative discharge board, but there was no evidence that either of them had been notified of or offered that opportunity. In both cases, while an upgrade was granted, the reasons for their respective discharges, namely misconduct, remained unchanged due to the Board's determination that the facts of the cases were as stated in the files. The final case this applicant cites (FD00-00151) is that of a captain who engaged in an unprofessional relationship with an enlisted subordinate over a 3-month period of time. Applicant believes the partial relief granted in that case was based on that applicant's difficulty obtaining post-service employment. Again, the Board finds applicant's interpretation of that case flawed. The applicant in case FD00-00151 submitted eight issues, seven of which were found to lack merit. On the remaining issue, that applicant was granted partial relief of an upgrade from UOTHC to general, but the board specifically determined a fully honorable characterization would not be appropriate given the nature of the misconduct. Nevertheless, the relief granted was based on the Board's conclusion that that applicant's discharge was too harsh in view of the nature of the misconduct and that applicant's otherwise acceptable service record; it was not based on that applicant's difficulty obtaining post-service employment. Furthermore, the Board contrasts this applicant's case with that applicant by noting that this applicant's misconduct occurred over a very extensive period of time, spanned assignments at two different bases, involved two different victims, and required the intervention of four different jurisdictions. Therefore this applicant has no similar basis for relief. Additionally, the DRB is not bound by its discretionary decisions in prior cases.

The Board found the characterization of service, and reason and authority for the discharge received by the applicant were appropriate.

**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