

AIR FORCE DISCHARGE REVIEW BOARD HEARING RECORD

NAME OF SERVICE MEMBER (LAST, FIRST MIDDLE INITIAL) [REDACTED]	GRADE	AFSN/SSAN [REDACTED]
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TYPE GEN	<input checked="" type="checkbox"/>	PERSONAL APPEARANCE	RECORD REVIEW
COUNSEL		NAME OF COUNSEL AND OR ORGANIZATION	ADDRESS AND OR ORGANIZATION OF COUNSEL
YES	No	Mr. Ted Jackson	Florida Department of Veteran's Affairs 00
<input checked="" type="checkbox"/>	<input type="checkbox"/>		

MEMBER SITTING	VOTE OF THE BOARD				
	HON	GEN	UOTHC	OTHER	DENY
	X+				
				X+	X
	X+				
				X+	X
				X+	X

ISSUES A94.11 A93.15 A94.05 A91.03	INDEX NUMBER A61.00 A60.00	EXHIBITS SUBMITTED TO THE BOARD		
		1	ORDER APPOINTING THE BOARD	
		2	APPLICATION FOR REVIEW OF DISCHARGE	
		3	LETTER OF NOTIFICATION	
		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 DATE 19 Apr 2004	CASE NUMBER FD-2002-0467	
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APPLICANT'S ISSUE AND THE BOARD'S DECISIONAL RATIONAL ARE DISCUSSED ON THE ATTACHED AIR FORCE DISCHARGE REVIEW BOARD DECISIONAL RATIONALE

Case heard at Washington, D.C., via VTC from Ft Gillem GA.

Advise applicant of the decision of the Board and the right to submit an application to the AFBCMR.

+ CHANGE REASON AND AUTHORITY TO SECRETARIAL AUTHORITY *[Signature]*

INDORSEMENT		DATE: 4/21/2004
TO: SAF/MRBR 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, 3RD FLOOR ANDREWS AFB, MD 20762-7002

AIR FORCE DISCHARGE REVIEW BOARD DECISIONAL RATIONALE

FD-2002-0467

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

The applicant personally appeared before the Discharge Review Board (DRB) at Andrews AFB MD, via VTC from Fort Gillem GA, on April 19, 2004. He was represented by Mr. Ted Jackson from the Florida Department of Veterans Affairs. Ms. RS, the applicant's mother, appeared as a witness. The applicant submitted one additional exhibit - Exhibit #6: Court Order of Expunction, dtd June 6, 2003.

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

FINDINGS: The applicant's request is granted in part and denied in part. The change of the reason and authority for discharge is granted. The upgrade of discharge and the change of reenlistment code 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 in the character of the discharge or the reenlistment code. However, based upon the record and evidence provided by applicant, the Board finds the applicant's reason and authority for discharge inequitable.

ISSUE:

The applicant was discharged for a pattern of misconduct and for a civilian conviction. During his term of service, the applicant was given four letters of reprimand (LOR), a record of individual counseling, and punishment under Article 15, Uniform Code of Military Justice. The misconduct documented by each of these disciplinary actions served as the basis for the discharge for a pattern of misconduct. One LOR memorialized the applicant's civilian conviction for aiding and abetting his wife in the theft of merchandise from a local Wal-Mart store. That civilian conviction served as a separate basis for discharge. The applicant submitted an expunction order nullifying the earlier conviction and providing *status quo ante* relief to the applicant. In effect, it was as if the conviction had not happened. In his testimony before the DRB, the applicant was articulate, affable, and engaging and provided a great deal of information for consideration by the DRB.

Issue 1. The applicant contends discharge was inequitable because it was too harsh. The DRB disagrees. The records indicated that the applicant received an Article 15, four LORs, and an RIC, along with three memoranda for record documenting additional instances of misconduct. Notwithstanding the testimony of the applicant, the DRB determined that the misconduct alleged actually occurred. With regard to the theft of the car part, the DRB was unable to credit the applicant's version of the events. Like the superiors who disciplined the applicant for this misconduct, the DRB found his explanation (i.e., that he forgot to pay) simply implausible. With regard to the failure to go to his physical therapy appointment, the DRB again was unable to credit the applicant's version of events in the face of contradictory facts provided by an uninterested third party. As for the trip to Mobile, AL, the DRB determined that the notification occurred as the applicant indicated. Notification was not, however, the issue; rather, the concern was whether the applicant had permission to leave the local area. The DRB found it difficult to believe the applicant did not think to check with someone in authority. Indeed, he noted that it occurred to him to ask the individual who briefed him on the post-9-11 orders, but that he was concerned the briefer would be unsympathetic. All of this misconduct provides a sufficient basis for a discharge for a pattern of misconduct. The Board concluded the misconduct was a significant departure from conduct expected of all military members and that through the administrative actions addressing the misconduct, the applicant had ample opportunities to change his

negative behavior. The administrative actions and the resulting discharge were appropriate given the applicant's misconduct.

Issue 2. The applicant contends that the command acted arbitrarily and capriciously in the administration of the disciplinary actions and the discharge and that there was supervisory mismanagement in his case. The DRB disagrees. There are four specific matters the DRB addressed in this regard. First, the DRB was concerned about the command's apparent attempt to levy correctional custody with an LOR. Although the LOR was apparently withdrawn, it was disquieting that a commander (and legal office) would have attempted to commit so obvious a procedural error. Second, the DRB was concerned the command, on more than one occasion, apparently took administrative action more than once for the same offense. While such an action is not improper, it does suggest the command lacked a coherent approach to discipline. Third, the applicant alleged the disciplinary action was the direct result of an e-mail complaint the applicant sent to the installation commander. The DRB noted that it was not until after the e-mail was sent that the applicant began to receive disciplinary action for misconduct. The DRB determined, however, that the applicant's misconduct did, in fact, take place. Thus, the administrative actions were the natural consequence of the misconduct. Finally, the DRB was concerned about the "wall-to-wall counseling" publication referenced by the applicant. While it was unprofessional to circulate such a document in the unit, there was no evidence the publication contributed in any way to the applicant's disciplinary action and subsequent discharge for the misconduct in which he actually engaged. In short, none of the aforementioned matters (alone or in the aggregate) amounted to arbitrary or capricious command action or supervisory mismanagement.

Issue 3. The applicant alleged that he was the victim of race and color discrimination. He claims to have been discriminated against by the white supervisors (race discrimination) and by the dark-skinned black supervisors (color discrimination) in the unit. Other than the testimony of the applicant, there was no other evidence presented on this issue. Based on the evidence presented, the DRB found no indication the applicant was the victim of discrimination.

Issue 4. The applicant contends that since his civilian conviction was expunged and nullified, the reason and authority for the discharge based on the civilian conviction cannot stand. The DRB agrees. Discharging a military member for a civilian conviction requires, among other things, a valid conviction. In this case, the conviction was nullified and the applicant treated by the civilian court system as though the criminal conviction never occurred. Since there is, for all intents and purposes, no longer a civilian conviction, a discharge based on that conviction cannot stand. It should be noted that whether the applicant actually engaged in the criminal conduct is a separate matter. Even though the conviction was rescinded, the DRB is not prevented from considering *facts* that led to the conviction. However, it was not necessary for the DRB to make a determination regarding the applicant's culpability for the Wal-Mart theft because the other misconduct was sufficient to justify discharge for a pattern of misconduct.

CONCLUSIONS: The Discharge Review Board concludes that the discharge for a civilian conviction is no longer valid and must be removed. The Discharge Review Board concludes further that the discharge for a pattern of misconduct was consistent with the procedural and substantive requirements of the discharge regulation, 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 Discharge Review Board concludes that: 1) there exists no legal or equitable basis for an upgrade of the character of the discharge or a change to the reenlistment code; and 2) the applicant's reason for discharge should be changed, under the provisions of Title 10, USC 1553, to indicate that the sole basis for discharge was a pattern of misconduct.

Attachment:
Examiner's Brief

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

MISSING MEDICAL RECORDS

[REDACTED]
 [REDACTED]
 (Former AMN) (HGH A1C)

1. **MATTER UNDER REVIEW:** Appl rec'd a GEN Disch fr USAF 25 Apr 02 UP AFI 36-3208, para 5.50 and 5.51 (Pattern of Misconduct and Civilian Conviction). Appeals for Honorable Disch.

2. **BACKGROUND:**

a. DOB: 19 Nov 80. Enlmt Age: 19 8/12. Disch Age: 21 5/12. Educ: HS DIPL. AFQT: N/A. A-72, E-71, G-70, M-62. PAFSC: 2F031 - Fuels Apprentice. DAS: 19 Dec 00.

b. Prior Sv: (1) AFRes 14 Aug 00 - 28 Aug 00 (15 Days) (Inactive).

3. **SERVICE UNDER REVIEW:**

a. Enld as AMN 29 Aug 00 for 6 years. Svd: 1 Yr 7 Mos 29 Das, all AMS.

b. Grade Status: AMN - 21 NOV 01 (Article 15, 21 Nov 01)
 A1C - 13 Oct 00

c. Time Lost: None.

d. Art 15's: (1) 21 Nov 01, Keesler AFB, MS - Article 86. You, did, on or about 9 Aug 01, without authority, go from your appointed place of duty. Article 92. You, having knowledge of a lawful order issued by Brigadier General -----, to remain on telephone stand-by and remain in the local area, and not to leave town, an order which it was your duty to obey, did, on or about 14 Sep 01, fail to obey the same by wrongfully traveling to Mobile, Alabama. Article 107. You, did, with intent to deceive, make to Senior Master Sergeant -----, an official statement, to wit: answering "yes" in response to Senior Master Sergeant ----- question, "Did you pay for the (auto) part (you received from -----)" which statement "yes" was false in that you did not pay for said auto part, and was then known by you to be so false. Article 121. You, did, on or about 21 Jul 01, steal an automobile part (a sensor) of a value of about \$66.02, the property of ----- . Reduction to AMN, 45 days restriction, 45 days extra duty, and a reprimand. (No appeal) (No mitigation)

- e. Additional: LOR, 08 MAR 02 - Arrested and convicted of shoplifting.
 MEMO, 07 MAR 02 - Traffic violation (speeding).
 RIC, 07 MAR 02 - Late for duty.
 LOR, 15 NOV 01 - No-show for an appointment and making a false official statement.
 LOR, 01 OCT 01 - Failure to obey an order or regulation.
 LOR, 01 AUG 01 - Failure to follow safety procedures, report for duty on time, attend scheduled appointments, and maintain integrity.
 MEMO, 01 AUG 01 - Unauthorized departure from mandatory physical training.
 MEMO, 30 JUL 01 - Failure to pay for auto parts and lying to supervisor.

f. CM: None.

g. Record of SV: None.

(Discharged from Keesler AFB)

h. Awards & Decs: AFTR, AFOUA.

i. Stmt of Sv: TMS: (1) Yr (8) Mos (12) Das
 TAMS: (1) Yr (7) Mos (29) Das

4. **BASIS ADVANCED FOR REVIEW:** Appln (DD Fm 293) dtd 25 Oct 02.
 (Change Discharge to Honorable)

ISSUES ATTACHED TO BRIEF

ATCH

1. Applicant's Issues.
2. Letters of References.
3. Disciplinary Documents with Timelines.
4. Attorney's Letter.
5. Mississippi Statute 97-1-3.
6. Letter to Discharge Review Board.

4 Feb 03/cr

ISSUE SHEET

[REDACTED]

1. Letter of Reprimand dated 1Aug01. Official Statement.

I, [REDACTED] did not believe that I had made a false statement. When contacted by the parts manger (Mr. [REDACTED]) I told him that if a mistake had been made that I would gladly fix it. I went to Champion Chrysler on Pass Road Biloxi, MS. Furthermore I was in Battle Dress Uniform and gave them my home address, phone number, and work phone number. My thinking is that if I had the intent of stealing the auto part that I would not have given them the above mentioned information so that they may contact the commander or myself. When I departed the dealership there were no alarms sounding alerting the establishment of a theft taking place. I realize that I made a mistake and corrected it as I stated above.

2. Letter of Reprimand dated 10Aug01. Absence without leave.

First, I know that I shouldn't have left without notifying a competent authority. I understand that. I went to the emergency room and was placed on a seven(7) day profile due the chest pain that I was experiencing. I have Three issues with this letter of reprimand.

A. The commander stated that he had found no evidence to support me leaving such as medical conditions. I was placed on a seven(7) day profile on the day in question. (9Aug01)

B. The commander attempted to give me thirty(30) days correctional custody with a Letter reprimand. This in itself can not be done with a letter of reprimand. This caused me to lose some respect in the commanders leadership ability. If I had not sought out legal guidance from the Area Defense Council I would have done as ordered and attended correctional custody.

C. In my response this letter of reprimand I made reference to an email that I sent to the base commander Brig. Gen. [REDACTED]. When my response was read by the commander I was strongly urged to rewrite my response. I did not. The letter of reprimand was withdrawn on 04Sept02. I do not know if it was because of the regulations being violated or response that submitted. All I can say is that things were never the same after that between the commander and myself.

3. Letter of Reprimand dated 01Oct01

I realize and take full responsibility for my actions that led to this letter of reprimand. On 5Sept01 I was contacted by the First Sergeant, [REDACTED] concerning my ,now wife, being at my on base residence. According to the housing manual rules I had not violated any rules pertaining to guests staying at my residence. She had not been at my residence for more than thirty(30) consecutive

days. I informed the First Sergeant that due to my age (20) at the time I would not be able to get married in Mississippi. I would have to go to Mobile, Al or Louisiana. Being that we at Keesler were on a compressed work schedule we had every other Friday off. I told the First Sergeant on 10Sept01 that I would be able to go on 14Sept01. The First Sergeant said that as long as I brought him marriage certificate that would be soon enough for him. I did that. I realize that on 11Sept01 this country was changed forever. I did notify my chain of command through the Fuels Control Center. When I called to inform them of where I was going Amn [redacted] answered the phone. SSgt. [redacted] was away from the Phone. Amn [redacted] wife kept my son while we went to Mobile to get married. I went there and straight back. SSgt [redacted] statement did not reach me before the three (3) days after the Letter of Reprimand had passed. Also attached are Amn [redacted] and [redacted] statement. Accompanying their statements also is the log sheet verifying that management was notified.

4. Letter of Reprimand dated 08Mar02- Civilian Conviction

First I would like to apologize for the shame and disgrace that this event brought onto the U.S. Air Force. I take full responsibility for wife's actions that caused this. I would like to say that even though there was not any evidence found on me I was found guilty by association. I know that my wife testified in court that this incident was all her doing. That fact is correct. There were some facts that were ignored by the commander. Yes I know that I was arrested on 08Nov01 for suspicion of shoplifting at the D'Iberville Wal-mart super center. On the day of my trial my attorney [redacted] spoke with the Wal-Mart representative and the prosecutor before the proceedings. The prosecutor wanted to dismiss my case due to insufficient evidence. Due to the fact that my son was present when we were arrested the Wal-Mart representative would not drop the charges. During my trial when the Wal-Mart representative was asked if he saw me conceal anything he simply said "NO". MSgt [redacted] was present at the trial to witness to these facts. I was assessed a fine of four-hundred ninety-five dollars. It was assumed by the First Sergeant that I was guilty being that I did not file and appeal. The reason I did not file an appeal was based on the fact that I had already spent one thousand dollars on my legal counsel. It would have cost more than that to file the appeal. Due to my rank at that time I did not have finances to satisfy that.

5. Wall to wall counseling and signs of a bad airman

This "publication was found in the lounge of my unit for all to see on the table. Given the way that E-4's and below were treated it seemed to convey the attitude that was felt from management. I will admit some might find this quite comical. However to those that would be on the receiving of this sort of technique would not find it so amusing. This was not being professional as I was taught in basic training and technical training.

6. Letters of recommendation

After being notified of my discharge recommendation I received five(5) letters of recommendations from noncommissioned and Senior noncommissioned officers on my conduct, job performance , attitude, and appearance. All state that after my article 15 they noticed a significant improvement.



DEPARTMENT OF THE AIR FORCE
AIR EDUCATION AND TRAINING COMMAND

28 MAR 2002

MEMORANDUM FOR AMN [REDACTED]

FROM: 81 SUPS/CC

SUBJECT: Notification Memorandum

1. I am recommending your discharge from the United States Air Force for a pattern of misconduct and civilian conviction. The authority for this action is AFPD 36-32 and AFI 36-3208, Chapter 5, Section H, paragraph 5.50 (pattern of misconduct) and paragraph 5.51 (civilian conviction). If my recommendation is approved, your discharge will be described as honorable or general. I am recommending that your service be characterized as general.

2. My reasons for this action are:

a. On 8 Nov 01, you were arrested by the Harrison County Sheriff's Department for suspicion of shoplifting at the Super Wal-Mart Shopping Center on Sangani Blvd, D'Iberville, MS. Subsequently, you were convicted of Shoplifting and you were assessed a fine. On 8 Mar 02, I issued you a Letter of Reprimand, placed it into your Unfavorable Information File (UIF) and placed you on the Control Roster. (Atch 1, Appendix A w/atchs)

b. On 7 Mar 02, you were ticketed by Security Forces personnel for driving your privately owned vehicle 44 mph in a posted 35 mph zone, for which you were verbally counseled on 8 Mar 02. (Atch 1, Appendix B w/atchs)

c. On 21 Nov 01, I punished you under Article 15, UCMJ, for the following infractions:

i. On or about 9 Aug 01, you failed to go to your appointed place of duty, to wit: Building 1201, Blake Gym. (Atch 1, Appendix C w/atchs)

ii. On or about 14 Sep 01, you having a lawful order issued by Brigadier General [REDACTED] to remain on telephone stand-by and remain in the local area, and not to leave town, failed to obey the order by wrongfully traveling to Mobile, Alabama. (Atch 1, Appendix C w/atchs)

iii. On or about 27 Jul 01, with intent to deceive, made an official statement to SMSgt [REDACTED], to wit: answering "yes" in response to his question, "Did you pay for the auto part you received from Champion Chrysler?" which statement was false in that you did not pay for the auto part. (Atch 1, Appendix C w/atchs)

iv. On or about 21 Jul 01, you stole an automobile part (a sensor), of a value of about \$66.02, the property of Champion Chrysler. (Atch 1, Appendix C w/atchs)

d. On 15 Nov 01, you received a Letter of Reprimand and UIF for the following infractions:

i. On 14 Nov 01, you departed the fuels flight for a 1500 hours physical therapy appointment, which was actually a scheduled 1400 hours appointment. Because SMSgt [REDACTED] needed to contact you, he instructed TSgt [REDACTED] contact the physical therapy staff. TSgt [REDACTED] was informed you were a no-show for the 1400 hours appointment. Upon investigation with the physical therapy technicians, it was revealed you did show up at 1500 hours and requested SrA [REDACTED] change your no-show to reflect as a cancelled appointment. Finally, you failed to report back to your duty section or contact competent authority for further instruction. (Atch 1, Appendix D w/atchs)

ii. On 14 Nov 01, SMSgt [REDACTED] contacted you at home at approximately 1630 hours and directed you to report for duty. After advising you of your Article 31 rights, you stated you were seen at physical therapy for an appointment at 1500 hours, and that you did engage in physical therapy under the indirect supervision of [REDACTED]. On 15 Nov 01, SMSgt [REDACTED] received information contradictory to your official statement you made to SMSgt [REDACTED] on 14 Nov 01. (Atch 1, Appendix D w/atchs)

e. On 14 Sep 01, you violated the 81 TRW/CC's CAT-Directive Number 020 to remain on telephone standby, not to leave the local area and to remain in the local area, by going to Mobile, Alabama and securing an Alabama Certificate of Marriage, for which you received a Letter of Reprimand, dated 1 Oct 01, and an UIF. (Atch 1, Appendix E w/atchs)

f. On divers occasions you failed to follow safety procedures, report for duty at the prescribed time, attend scheduled appointments, and maintain your integrity, for which you received a Letter of Reprimand, dated 1 Aug 01, and an UIF. (Atch 1, Appendix F w/atchs)

3. Copies of the documents to be forwarded to the separation authority in support of this recommendation are attached. The commander exercising SPCM jurisdiction or higher will decide whether you will be discharged or retained in the Air Force, and, if you are discharged, how your service will be characterized. If you are discharged, you will be ineligible for reenlistment in the Air Force. Any special pay, bonuses, or education assistance funds may be subject to recoupment.

4. You have the right to consult legal counsel. Military legal counsel has been obtained to assist you. I have made an appointment for you to consult Area Defense Counsel at Bldg 0701, Room 133, on 1 Apr 02 at 0630 hours. You may consult civilian counsel at your own expense.

5. You have the right to submit statements on your own behalf. Any statements you want the separation authority to consider must reach me by 3 APR 02 by 1630 hours unless you request and receive an extension for good cause shown. I will send them to the separation authority.

6. If you fail to consult counsel or to submit statements in your own behalf, your failure will constitute a waiver of your right to do so.
7. You have been scheduled for a medical examination. You must report to 81st Medical Group, Physical Exams on 1 Apr, 2002 at 1615 hours for the examination.
8. Any personal information you furnish in rebuttal is covered by the Privacy Act of 1974. A copy of AFI 36-3208 is available for your use in Bldg 4002, CQ.
9. Execute the attached acknowledgment and return it to me immediately.


Lt Col, USAF
Commander

Attachments:

1. Supporting Documents
 - a. Letter of Reprimand, dated 8 Mar 02 w/atchs
 - b. DD Form 1408, dated 7 Mar 02 w/atchs
 - c. AF Form 3070, dated 21 Nov 01 w/atchs
 - d. Letter of Reprimand, dated 15 Nov 01 w/atchs
 - e. Letter of Reprimand, dated 1 Oct 01 w/atchs
 - f. Letter of Reprimand, dated 1 Aug 01 w/atchs
2. Airman's Receipt of Notification Memorandum
3. Airman's Statement
4. Medical Examination

ATCH 1