

AIR FORCE DISCHARGE REVIEW BOARD HEARING RECORD

NAME OF SERVICE MEMBER (LAST, FIRST MIDDLE INITIAL) ██			GRADE AB		AFSN/SSAN ████████████████████			
TYPE BCD	X	PERSONAL APPEARANCE			RECORD REVIEW			
COUNSEL	NAME OF COUNSEL AND OR ORGANIZATION			ADDRESS AND OR ORGANIZATION OF COUNSEL				
YES	No	██			██			
X								
MEMBER SITTING				VOTE OF THE BOARD				
				HON	GEN	UOTHC	OTHER	DENY
								X
								X
								X
								X
								X
ISSUES A91.05		INDEX NUMBER A39.00		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 16 Nov 2004		CASE NUMBER FD-2003-00403						
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.								
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.								
INDORSEMENT				DATE: 12/7/2004				
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

CASE NUMBER

FD-2003-00403

GENERAL: The applicant appeals for an under honorable conditions (general) discharge.

The applicant appeared before the Discharge Review Board (DRB) via video teleconference from Randolph AFB, Texas, on 16 November 2004. He was represented by counsel, [REDACTED]

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

Additional Exhibits presented by the applicant included Exhibit #6, a 15-page support package.

FINDINGS: Upgrade of discharge is denied.

The applicant received a Bad Conduct Discharge, a punitive separation, as part of his sentence resulting from a Special Court-Martial conviction. Under the provisions of 10 U.S.C. §1553, the only basis for a change of a Bad Conduct discharge is clemency. The applicant presented no evidence which the DRB believed warranted a grant of clemency.

ISSUES:

Issue 1. Applicant contends his bad conduct discharge (BCD) should be changed to a general discharge because no one (including himself, the convening authority, the reviewing authorities, or his military defense counsel) knew or considered that his special court-martial conviction would result in his having to register as a sex offender. The applicant contends that if this result had been known to the individuals mentioned above, he would have been granted clemency in the form of a substitution of an administrative discharge for his punitive discharge and therefore would not need to register as a sex offender. The applicant submitted matters which show that his special court-martial conviction is a qualifying conviction under Texas law and thus requires him to register as a sex offender. He argues that if he had not received the punitive separation, he would not have to register, or in the alternative, that he could present that evidence to Texas law enforcement officials to argue that he should not have to register as a sex offender. The DRB found this argument without merit. The sex offender registration law presented by the applicant clearly demonstrates that it is the underlying conviction which leads to sex offender registration. Therefore, the DRB concluded that change of the applicant's discharge from punitive to administrative was not warranted.

Issue 2. Applicant argues that the fact his commander and some of the court-martial panel members preferred he receive an administrative separation warrants a change of the separation from a BCD to a general discharge. The DRB found this issue without merit as the convening authority, armed with this information, made the conscious decision to approve the BCD. The DRB concluded the discharge was appropriate for the reasons which were the basis for this case.

Issue 3. Applicant argues that recent changes in the guidance found in the Manual for Courts-Martial regarding the handling of allegations of adultery warrant a change of his BCD to a general discharge. In arguing for this change, the applicant cited several court-cases including two which had been reviewed by the appellate courts. The DRB disagrees with the applicant that the holdings in the cited cases warrant a change in his discharge. The DRB believed that the member's contentions were without merit and his BCD remains appropriate.

Issue 4. The applicant contends he had an affirmative defense of mistake of fact concerning the age of the victim and thus he should be granted clemency. This argument was raised by the applicant at his trial and

apparently was not believed by the court-martial panel. The DRB could find no reason to disregard that finding or upgrade his discharge on that basis.

Issue 5. Finally, the applicant contends his sentence was disproportionate with that received by his co-defendant who, according to the applicant, did not receive a BCD. The DRB found this argument unpersuasive and believed his BCD was appropriate.

CONCLUSIONS: The Discharge Review Board concluded that the applicant's punitive discharge by Special Court-Martial is appropriate under the facts and circumstances of this case and there is insufficient basis, as an act of clemency, for a change of discharge.

Attachment:
Examiner's Brief

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

MILITARY PERSONNEL RECORDS TO INCLUDE
DD FM 214 AND MEDICAL RECORDS LOST

(Former AB) (HGH A1C)

1. **MATTER UNDER REVIEW:** Appl rec'd a BCD Disch fr USAF 9 AUG 00 UP Special Court Martial Order No 4, 11 May 99. Appeals for General Disch.

2. **BACKGROUND:**

a. DOB: 6 Feb 76. Enlmt Age: 19 5/12. Disch Age: 24 6/12. Educ: HS DIPL. AFQT: N/A. A-70, E-51, G-57, M-21. PAFSC: 1T131 - Life Support Apprentice. DAS: 6 Jan 96.

b. Prior Sv: (1) AFRes 25 Jul 95 - 8 Aug 95 (15 Days) (Inactive).

3. **SERVICE UNDER REVIEW:**

a. Enld as AB 9 Aug 95 for 4 yrs. Svd: 5 Yrs 0 Mo 1 Das, (Examiner's Note: Service over 4 yrs as a result of 6 months confinement and excess leave status).

b. Grade Status: AB - 26 Feb 99 (Special Court Martial Order, 26 Feb 99.
A1C - 11 Dec 96
AMN - Unknown

c. Time Lost: (Examiner's Note: Time lost should be 6 months as a result of court martial sentence).

d. Art 15's: None.

e. Additional: (Examiner's Note: The following information was obtained from 559 FTS/CC's Letter, Subject: Request for Discharge in Lieu of Trial by Court Martial)

LOR, 12 JUN 98 - Failure to obey a lawful order.
CIVIL ARREST, 28 MAR 98 - Assault with bodily injury
against spouse.

f. CM: Special Court Martial Order No 4, 11 May 99.

CHARGE 1: Article 120. Plea: Not Guilty. Finding: Guilty.

Specification: Did. at or near San Antonio, TX, on divers occasions between on or about 8 July 1998 and on or about 9 July 1998, commit the offense of carnal knowledge with [REDACTED]

CHARGE II: Article 125. Plea: Not Guilty. Finding: Guilty.

Specification: Did, at or near San Antonio, TX, on divers occasions between on or about 8 Jul 98 and on or about 9 Jul 98, commit sodomy with [REDACTED] child under tha age of 16 years.

CHARGE III: Article 134. Plea: Not Guilty. Finding: Guilty.

Specification: A married man, did, at or near San Antonio, TX, on divers occasions between on or about 8 Jul 98 and on or about 9 Jul 98, wrongfully have sexual intercourse with [REDACTED] a female not his wife. Sentence adjudged by officer and enlisted members on 26 Feb 99: Bad Conduct discharge, confinement for 6 months, forfeiture of \$638.00 pay per month for 6 months and reduction to airman basic.

g. Record of SV: Unknown.

(Discharged from Randolph AFB)

h. Awards & Decs: AFTR, NDSM.

i. Stmt of Sv: TMS: (5) Yrs (0) Mos (16) Das
TAMS: (5) Yrs (0) Mos (1) Das

4. BASIS ADVANCED FOR REVIEW: Appln (DD Fm 293) dtd 19 Aug 03.
(Change Discharge to General)

ISSUES ATTACHED TO BRIEF

ATCH

1. Applicant's Issues.
2. Sex Offender Documents.
3. Request for Discharge in Lieu of Trial by Court Martial.
4. Court Martial Documents.
5. Articles on Adultery.
6. Photograph.

18 Dec 03/cr

Block 8. Issues Continuation Sheet.

In my special court-martial at Randolph Air Force Base, convening and reviewing authorities should have exercised clemency in my case and mitigated my conviction and bad conduct discharge to an administrative discharge for the following reasons:

a. Sex Offender Registration Not Considered at Time. No one--not convening or reviewing authorities, my military counsel, or me--knew or considered that my special court-martial conviction would result in my having to register and to report to police quarterly *for the rest of my life* as an aggravated sexual offender under Texas Code of Criminal Procedure, chapter 67.

(1) On September 1, 1997, the Texas Legislature amended the Sex Offender Registration Program Act to include "a conviction under the law of another state *or the Uniform Code of Military Justice* for an offense containing elements of the offense [for sex crimes under the Texas Penal Code]. Texas Code of Criminal Procedure article 62.01(5)(I).

(2) I was convicted in 1999 by a special court-martial for acts occurring on 8-9 July 1998. In 1999, a conviction by a special court-martial was not a felony conviction. A special court-martial was not authorized to impose a felony conviction until three years later with the promulgation of Executive Order 13262 of April 11, 2002, as published in 67 Federal Register 18773, April 17, 2002.

(3) Although I was not convicted of a felony, the statute uses an elements of an offense test. The Texas Department of Public Safety has characterized my conviction as a "sexually violent offense" because my female sex partner was under age 17. Texas Code of Criminal Procedure article 62.01(6); Texas Penal Code § 22.011(a)(2)(A) & (c)(1). The "sexually violent" characterization is based solely on the Texas statutory definition of the term to include a partner under age 17. It matters not that violence and threats of violence were absent in my case.

(4) I strongly believe that the convening and reviewing authorities would have granted me clemency and mitigated my case to an administrative discharge has this impact been known.

b. Commander Recommendation and Member Inquiry about Administrative Discharge. Both my commander and apparently the court-martial members preferred my receiving an administrative discharge.

(1) Prior to trial, my unit commander had recommended approval of my request for discharge in lieu of a court-martial. The convening authority denied this request. (This documentation is located between the Article 32 investigation and the record for the special court-martial.)

(2) After the court-martial had found me guilty, the members in the sentencing stage of trial sent a note to the military judge (Appellate Exhibit XVIII, Record at 446) asking:

Is a bad conduct discharge the only type of punitive discharge, i.e. are general under other than honorable, etc. also considered punitive discharges? *Can other discharges be used?*

(3) Thus, I do not think it is unreasonable to conclude that the court-martial members and my unit commander wanted me to get an administrative discharge rather than a bad conduct discharge. This is a matter that should have been addressed in clemency.

c. Aspects of Adultery Charge. The convening and reviewing authorities did not give adequate clemency consideration on the conviction for adultery.

(1) At the time of the acts in my special court-martial, 8-9 July 1998, I had already filed for divorce. The divorce was granted on August 20, 1998, before my court-martial. (See the decree at Article 32 Investigation Exhibit 9.)

(2) Adultery is an Article 134 offense, which requires proof on conduct to the prejudice of good order and discipline or service-discrediting conduct. Adultery is not service-discrediting when, as in my case, a divorced is filed and pending at the time of the adulterous act.

(a) United States v. Qualls, 43 M.J. 234 (C.A.A.F. 1995) [redacted] *dissenting from denial of grant for petition for review* (Base legal office had prepared a separation agreement and then prosecuted Qualls for adultery).

(b) United States v. Perez, 33 M.J. 1050, 1054 (A.C.M.R. 1991) (conviction for adultery reversed for insufficient evidence where defendant and wife had separated before adulterous acts).

(c) Policy Changes. In 1998--the exact date is unknown as whether it was before or after my actions, the [redacted] authored a change to the Manual for Courts-Martial. This change provided that cases of adultery be handled at the lowest appropriate level, and it provided specific guidance to commanders for use in order to determine whether or not the member's conduct was prejudicial to good order and discipline or service-discrediting. This proposal was dropped due to opposition from Congress, which was looking into the President's own dalliance with [redacted]. In a quiet move in 2002, after my conviction and in recognition of the unfairness of the application of the adultery specification, President [redacted] changed the Manual for Courts-Martial requirement for adultery in Executive Order 13262 of April 11, 2002, as published in 67 Federal Register 18773, 18778 (April 17, 2002). Those new requirements specifically address the fact of separation (factor h) as a significant factor in determining whether there was conduct prejudicial to good order and discipline or service discrediting conduct. My situation fell within this factor as I was separated and pending divorce at the time of my adulterous act.

(3) Under the circumstances and the law, the convening and reviewing authorities should have granted me clemency and mitigated my conviction to an administrative discharge.

d. Mistake of Fact on Age. I did not know [REDACTED] was under age 16. Her buxomous photograph (special court-martial Defense Exhibit B) and my personal observation of her certainly is not suggestive of a person under 16. The convening and reviewing authorities should have granted me clemency on the remaining two specifications and mitigated my conviction to an administrative discharge.

e. Sentence Comparison with Co-Defendant. The convening and reviewing authorities did not give adequate clemency consideration to sentence comparison. Co-defendant [REDACTED] was likewise court-martialed for carnal knowledge and sodomy with [REDACTED] and he did not receive a bad conduct discharge. He only received partial forfeitures and six months confinement.



DEPARTMENT OF THE AIR FORCE
AIR EDUCATION AND TRAINING COMMAND

MEMORANDUM FOR 12 FTW/CC

FROM: 559 FTS/CC

SUBJECT: Request for Discharge in Lieu of Trial by Court-Martial [REDACTED]

1. I recommend that the attached request for discharge be approved for the following reasons:

a. After reviewing [REDACTED] Request and discussing the case with 12 FTW/JA, it appears [REDACTED] may indeed have a plausible defense to the Carnal Knowledge charge. The charges were preferred based on information that led me to believe [REDACTED] actually knew the victim was under 16 years of age. The evidence clearly indicates the co-actor [REDACTED] knew how old she was prior to [REDACTED] involvement. A reasonable assessment of the facts, as I believed them to be at the time, indicated the co-actor either told or communicated to [REDACTED] that the victim was less than 16 years of age. However, [REDACTED] presented a sworn statement from the co-actor at the Article 32 hearing stating he [REDACTED] told [REDACTED] she was 17 years old on the way over to the victim's house on the night of the misconduct. As a result, [REDACTED] may have indeed believed she was 17 years old, raising the mistake of fact defense as to her age.

b. Absent the crime of Carnal Knowledge and Sodomy with a child under 16 years of age, [REDACTED] makes a good argument that the remaining offenses of Sodomy and Adultery may appropriately be handled with nonjudicial punishment. [REDACTED] had already filed for divorce from his wife and was awaiting the statutory time period for the divorce to become final.

c. The victim's family has already been through a significant ordeal. A fully litigated trial will force the victim, and her family, to testify about the sexual encounters in detail and in open court. In balancing the two options, I believe approving this request is a reasonable outcome and would negate the need for the 15 year old girl to expose sensitive and embarrassing details in at least two more open forums (once for [REDACTED] trial and once for [REDACTED] trial).

2. If this request for discharge is approved, I recommend that [REDACTED] be furnished an Under Other Than Honorable Conditions (UOTHC) Discharge. There have been no promises made to [REDACTED] that I would recommend anything other than a UOTHC, or that he would receive anything other than a UOTHC discharge.

3. [REDACTED]

a. Is not under investigation.

b. Is not awaiting action under AFIs 36-2503 and 36-2902, or another section of this regulation.

c. Is not awaiting result of trial.

d. Is not absent without authority.

e. Is not absent in the hands of civil authorities.

f. Has been referred to a medical facility for evaluation.

g. Is not in default with respect to public property or public funds.

h. Has not completed 16 or more years of active military service.

i. Is not accountable or responsible for public property or funds.

j. Member has not received special pay, bonuses, or education assistance.

4. There has not been a report of recent misconduct.

5. Court-martial charges have been preferred. Attached are:

a. A copy of the Charge Sheet, and my 1st Indorsement to the Charge Sheet.

b. A copy of the Article 32 Report.

c. A copy of the OSI Report, which includes copies of the witnesses' statements.

6. Charges have been referred for trial.

7. At the time of the misconduct, [REDACTED] did not have a mental disease or defect that caused him to lack the substantial capacity either to appreciate the criminality (wrongfulness) of the acts, or to conform to the law (AFI 44-109). [REDACTED] presently has the capacity to understand the nature of the proceedings and to assist in his defense.

8. [REDACTED] does not hold a Reserve of the Air Force appointment as a commissioned or warrant officer.

9. Information from the military record follows:

a. Date and Term of Enlistment: 10 Aug 95, 4 years

Date this Period of Continuous Active Duty Began: 10 Aug 95

Pay Date: 10 Aug 95

TAFMSD: 10 Aug 95

Prior Active Service: None

b. Date of Birth: 6 Feb 76

c. Test Scores: Admin - 70 Elec - 51 Gen - 57 Mech - 21

d. Formal Training: Basic Military Training School, Life Support Apprentice

e. Date Assigned Unit: 6 Jan 96

f. Current Grade and Effective Date: Airman First Class (E-3), 11 Dec 96

g. Demotions: None

h. Time Lost: None

i. Record of Disciplinary Actions: None

j. Overall Ratings on EPRs: 9 Apr 97 - 8 Apr 98 3
9 Aug 95 - 8 Apr 98 3

k. Favorable Communications, Citations, or Awards: Air Force Basic Training Ribbon,
National Defense Service Medal

l. Derogatory Data, Other than action by courts-martial or under Article 15, UCMJ: Civilian
Conviction for "Assault Bodily Injury" (received suspended sentence and probation), and an
LOR, dated 12 Jun 98, for failure to obey a lawful order.

m. Medical or Other Data Meriting Consideration: None

10. I believe it is in the best interests of justice that [redacted] Request be approved.

[redacted signature]
[redacted]
[redacted] SAF
Commander, 559 FTS

Attachments:

- 1. AF Form 458
- 2. 1st Indorsement to AF Form 458
- 3. Article 32 Report
- 4. OSI ROI 98401D7-S836876