

AIR FORCE DISCHARGE REVIEW BOARD DECISIONAL RATIONALE

CASE NUMBER

FD-2003-00455

GENERAL: The applicant appeals for upgrade of his general discharge to honorable. The applicant, his wife, and his counsel, Mr. ██████████ appeared before the Discharge Review Board (DRB). In addition to the matters attached to his application, the applicant provided statements from Capt ██████████, MSgt ██████████, SSgt ██████████ and MSgt ██████████. The attached brief contains available pertinent data on the applicant and the factors leading to the discharge.

FINDINGS: Upgrade of Discharge is denied.

BACKGROUND: The applicant received a general discharge after waiving his right to present his case before an administrative discharge board. The applicant's record during the enlistment under review contains an Article 15 for theft of gasoline, a reprimand for being late to work, a reprimand for improperly using and failing to pay his government credit card bill, a reprimand for dishonorably failing to pay a credit card bill, and a Summary Court-Martial conviction for wrongfully using a government computer to view pornography.

Issue 1. Applicant contends his Summary Court-Martial conviction is unjust because the court wrongfully considered evidence which should have been excluded. Specifically, the applicant believes the court should not have received in evidence the computer on which the pornography was found. He states that computer should have been stored by the Security Forces or the Office of Special Investigations rather than in the commander's or first sergeant's office. The Military Rules of Evidence do not require evidence to be kept in a particular location. Moreover, by removing the computer for use and then placing it in offices where it could be observed by responsible squadron personnel, the applicant's unit took appropriate action to safeguard the computer and ensure it would be available for trial. Based on the foregoing, the DRB found this issue to be without merit.

Issue 2. Applicant contends his Summary Court-Martial conviction is unjust because the court wrongfully considered evidence which should have been excluded. Specifically, the applicant believes the court should not have considered a computer disc containing a copy of the pornographic files copied from the applicant's government computer. The applicant claims that the disc containing the files was made shortly after he was accused of viewing pornography on his government computer. From that date until his trial about 3 months later, the applicant claims the disc was not properly secured. The technician who made the disc simply brought the disc with him to the applicant's trial. The applicant's unit appropriately safeguarded this evidence by entrusting it to the technician who brought it with him to the applicant's trial. Based on the foregoing, the DRB found this issue to be without merit.

Issue 3. The applicant claims one of his supervisors, MSgt ██████████ "was predisposed to blame" him for incidents "that were not my doing." The applicant's record contains counselings, reprimands, and Article 15s from personnel other than MSgt ██████████. Based on the foregoing, the DRB found this issue to be without merit.

Issue 4. The applicant contends his military defense counsel did not have sufficient time to prepare his case. The evidence in the file and the applicant's testimony indicate that the applicant was initially offered a nonjudicial punishment for misusing his government computer in July 2000. The applicant's Summary Court Martial was not convened until October 2000. The Board also noted the applicant was offered the opportunity to present this issue and any other that he believed appropriate to a discharge board. The applicant, after discussing the decision with his counsel, elected to waive his discharge board provided he received no worse than a general discharge. Based on the foregoing, the DRB concluded this issue was

without merit.

Issue 5. Applicant contends the reprimand he received on 1 Feb 89 for wrongfully using his government credit card and failing to pay an \$8.97 charge should not have been considered at either his court-martial or by the convening authority during his discharge action. The Board found the applicant's evidence on this issue to be strong and agrees the reprimand should have been excluded. The Board, however, is unable to upgrade the respondent's discharge based on this finding. The amount and severity of the applicant's misconduct which is well established by evidence in the file convinced the Board that even had this reprimand not been included there would have been no change in the outcome of either his trial or his discharge. The Board determined that this error did not constitute prejudicial error, i.e., there was not substantial doubt that the discharge would have remained the same if the error had not been made. Based on the foregoing, the DRB concluded there is no basis on which to grant relief on this issue.

CONCLUSIONS: The Discharge Review Board concludes that the discharge 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 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 A1C) (HGH SrA)

1. **MATTER UNDER REVIEW:** Appl rec'd a GEN Disch fr USAF 31 Jan 01 UP AFI 36-3208, para 5.49 (Misconduct - Minor Disciplinary Infractions). Appeals for Honorable Disch.

2. **BACKGROUND:**

a. DOB: 19 May 73. Enlmt Age: 18 1/12. Disch Age: 27 8/12. Educ: HS DIPL. AFQT: N/A. A-61, E-75, G-82, M-56. PAFSC: 2S051 - Fuels Journeyman. DAS: (EPR Indicates): 19 Nov 91-18 Nov 92.

b. Prior Sv: (1) AFRes 19 Jun 01 - 18 Nov 91 (5 months 1 day) (Inactive).

(2) Enlisted as AB 19 Nov 91 for 4 yrs. Svd: 3 yrs 2 months 21 days, all AMS. AMN - Unknown. A1C-(EPR Indicates): 19 Nov 91-18 Jul 93. SrA - 19 Nov 94. EPRs: 4,5.

3. **SERVICE UNDER REVIEW:**

a. Reenlisted as SrA 10 Feb 95 for 6 yrs. Svd: 5 Yrs 11 Mo 21 Das, all AMS.

b. Grade Status: A1C - 5 Oct 00 (Summary Court Martial, 5 Oct 00)

c. Time Lost: None.

d. Art 15's: (1) 17 Jun 97, Pope AFB, NC - Article 121. You, did, between on or about 1 Nov 96 and on or about 1 Apr 97, on divers occasions, steal gas, military property, of a value of \$100.00 or less, the property of the United States Air Force. Suspended reduction to A1C. Forfeiture of \$200.00 pay, and 14 days extra duty. (Appeal/Denied) (No mitigation)

e. Additional: LOR, 06 NOV 00 - Financial irresponsibility.
LOR, 01 FEB 99 - Financial irresponsibility.
RIC, 03 DEC 98 - Dereliction of duty and damage to government vehicle.
RIC, 17 NOV 98 - Destruction of government property and failure to notify supervisor.
RIC, 17 NOV 98 - Failure to Chock Refueling Unit.
RIC, 06 JUL 98 - Late for duty.

f. CM: Summary Court Martial - 5 Oct 00

Article 92. Did, on divers occasions, at or near Pope, AFB, NC,

between on or about 2 Jul 00 and on or about 8 Jul 00, fail to obey a lawful general regulation, to wit: paragraph 6.1.1 of AFI 33-129, dated 1 Aug 99, by wrongfully using a government computer for unauthorized purposes, to include viewing pornographic images. Sentence adjudged on 5 Oct 00: Reduction to A1C and 18 days confinement.

g. Record of SV: 19 Jul 94 - 18 Jul 95 Pope AFB 5 (Annual)
 19 Jul 95 - 18 Jul 96 Pope AFB 4 (Annual)
 19 Jul 96 - 18 Jul 97 Pope AFB 2 (Annual) **REF**
 19 Jul 97 - 18 Jul 98 Pope AFB 5 (Annual)
 19 Jul 98 - 13 Feb 99 Pope AFB 2 (CRO) **REF**
 14 Feb 99 - 12 Aug 99 Pope AFB 5 (CRO)
 13 Aug 99 - 12 Aug 00 Pope AFB 3 (Annual)

(Discharged from Pope AFB)

h. Awards & Decs: AFLSAR W/1 DEV, AFTR, NDSM, NCOPMER, AFOUA, AFGCM W/1 DEV.

i. Stmt of Sv: TMS: (9) Yrs (7) Mos (12) Das
 TAMS: (9) Yrs (2) Mos (5) Das

4. **BASIS ADVANCED FOR REVIEW:** Appln (DD Fm 293) dtd 1 Sep 03.
 (Change Discharge to Honorable)

ISSUES ATTACHED TO BRIEF.

ATCH

1. Applicant's Issues.
2. DD Form 149.
3. Application for Relief Under Article 69(b), UCMJ.
4. Character Reference(2).
5. American Express Receipt.
6. Enlisted Performance Report(2).
7. AF Form 1297.
8. Character Reference.
9. American Express Correspondence with Attachments.
10. Memo for Record.

2DEC03/ia

7. SUPPORTING DOCUMENTS (X as applicable) (Please print name and Social Security Number on each document.)

WILL NOT BE SUBMITTED. PLEASE COMPLETE REVIEW BASED ON AVAILABLE SERVICE RECORDS.

ARE LISTED BELOW AND ARE ATTACHED TO THIS APPLICATION: (Continue on a plain sheet of paper if more space is needed.)

a. DOCUMENT 1:
STATEMENT FROM MSgt [REDACTED]

b. DOCUMENT 2:
STATEMENT FROM CAPT [REDACTED]

c. DOCUMENT 3:
COPY OF HAND RECEIPT SERVING AS CHAIN OF CUSTODY OF EVIDENCE

B. ISSUES

The Board will consider any issue submitted by you prior to closing the case for deliberation. The Board will also review the case to determine whether there are any issues that provide a basis for upgrading your discharge. However, the Board is not required to respond in writing to issues of concern to you unless those issues are listed or incorporated by specific reference below. Carefully read the instructions that pertain to Block 8 prior to completing this part of the application. If you need more space, submit additional issues on an attachment.

In submitting this application, I am requesting that special attention be paid to the evidence, in particular the security, and the chain of custody. In the Military Rules of Evidence it clearly state that evidence must be handled and secured by the proper authorities to wit; the AFOSI or the Security Police. Neither of the two were notified of this particular case and therefore never secured the evidence. The AFOSI was contacted 82 days after the incident and asked to review the computer which by then had changed hands twice and was left unsecured at least 70% of the time. Witnesses were allowed to examine the computer and even make copies of supposed evidence to diskette. The diskette was never turned over with the computer as evidence but was allowed to be brought in as evidence 82 days later at the trial. The diskette was kept in the possession of one of the key witnesses who brought it into the courtroom in his dress blues coat pocket. Information off this diskette, the supposed cookies files, were put into the record of trial but the diskette itself was never mentioned. To incriminate someone of these offenses all one would have to do is change the clocktime on the computer and whomever was on during this particular time that it was set to would have these files added to their history. Anyone with the system password could change the clocktime, hence, all three of the witnesses with whom I worked. Shortly after this incident supposedly took place I was asked by my Flight Commander Lt. [REDACTED] if I had committed the offense and I stated "no". He contacted Incirlik AB Turkey where I had just returned from a 90 day deployment and inquired about my computer usage and was told that I had committed no such offense and that the computers were secretly monitored. It was also explained to him that I had ample opportunity to do so as I worked alone 80% of my time there but had done no such thing. I was even given an LOE for all my hard work there. I have contacted numerous Air Force agencies trying to have this matter corrected but have had the door closed in my face or just plain ignored. It was not until I recieved assistance from the 43 Wing Deputy IG that I contacted you. I've talked to civilian as well as Air Force, Army, Navy, and Marine JAG officers and they all have come to the same conclusion, something was very much wrong here. They all questioned how this was even allowed into court with the evidence never being authenticated or secured.

I HAVE LISTED ADDITIONAL ISSUES AS AN ATTACHMENT TO THIS APPLICATION.

I PREVIOUSLY SUBMITTED AN APPLICATION ON (Enter date) AND AM COMPLETING THIS FORM IN ORDER TO SUBMIT ADDITIONAL ISSUES.

THE ABOVE ISSUES SUPERSEDE ALL PREVIOUSLY SUBMITTED.

9. CERTIFICATION

I make the foregoing statements as part of my application with full knowledge of the penalties involved for willfully making a false statement. (U.S. Code, Title 18, Section 1001, provides that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)

a. DATE (YYYYMMDD)

1 Sept 03

b. SIGNATURE

[REDACTED SIGNATURE]

UPON COMPLETION, MAIL THIS APPLICATION TO APPLICABLE ADDRESS BELOW

ARMY	NAVY & MARINE CORPS	AIR FORCE	COAST GUARD
Army Review Boards Agency Support Division, St. Louis ATTN: SFMR-RBR-SL 9700 Page Avenue St. Louis, MO 63132-5200 (See http://arba.army.pentagon.mil)	Naval Council of Personnel Boards 720 Kennon Street, S.E. Rm. 309 (NDRB) Washington Navy Yard, DC 20374-5023	SAF/MIBR 550-C Street West, Suite 40 Randolph AFB, TX 78150-4742	Commandant (G-WPM) 2100 Second Street, S.W. Washington, DC 20593-0001



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 43D AIRLIFT WING (AMC)
POPE AIR FORCE BASE NORTH CAROLINA

16 NOV 2000

MEMORANDUM FOR AIC [REDACTED] 43 SUPS

FROM: 43 SUPS/CC
1443 Reilly Street
Pope AFB NC 28308

SUBJECT: Notification Memorandum - Board Hearing

1. I am recommending your discharge from the United States Air Force for Minor Disciplinary Infractions. The authority for this action is AFDP 36-32 and AFI 36-3208, Chapter 5, Section H, paragraph 5.49. The most severe type of discharge authorized in this case is an under other than honorable conditions discharge, if the convening authority determines such characterization is warranted and directs initiation of a discharge board. I am recommending that your service be characterized as general. Copies of the documents to be forwarded to the separation authority to support this recommendation are attached.

2. My reasons for this action are:

a. On or about 1 Oct 00, you dishonorably failed to pay your just debts. You were delinquent in the payment of your government travel card in the amount of \$913.15 as documented by an Letter of Reprimand (LOR), dated 6 Nov 00.

b. Between on or about 2 Jul 00 and on or about 8 Jul 00, you did, on divers occasions, at or near Pope AFB NC, fail to obey a lawful general regulation, to wit: paragraph 6.1.1 of AFI 33-129, dated 1 Aug 99, by wrongfully using a government computer for unauthorized purposes, to include viewing pornographic images as documented by an AF Form 1359, Report of Result of Trial, dated 5 Oct 00.

c. Between on or about Oct 98 and on or about Dec 98, investigation disclosed that you failed to pay your American Government Express Card bill, to wit: the amount of \$8.97. The charge that you failed to pay was an unauthorized charge at Blockbuster Video as documented by an Letter of Reprimand (LOR), dated 1 Feb 99.

d. On or about 2 Dec 98, at approximately 1715 hours you left the fillstand in unit 97L37. You did not verify that your ground cable was securely wrapped, because it was found the next morning broken and completely wrapped around the front left dual as documented by an AF Form 174, Record of Individual Counseling, dated 3 Dec 98.

e. On or about 16 Nov 98, you were preparing to get your Refueling unit filled at the Type III fillstand. You parked your unit and proceeded to get the hydrant operator from building 1107. While going toward the building you noticed the hydrant operator in the window. You knocked on the window to get the operator's attention and the window fell and broke as documented by an AF Form 174, Record of Individual Counseling, dated 17 Nov 98.

f. On or about 16 Nov 98, you were cited for not chocking Unit 96L019. Failing to chock the unit increases the chance for the unit to roll and hit other Government equipment if the parking brakes fail as documented by an AF Form 174, Record of Individual Counseling, dated 17 Nov 98.

g. On or about 6 Jul 98, at 1530 hours, you were late coming to work as documented by an AF Form 174, Record of Individual Counseling, dated 6 Jul 98.

h. Between on or about 1 Nov 96, and on or about 1 Apr 97, you did, on divers occasions, steal gas, military property, of a value of \$100.00 or less, the property of the United States Air Force as documented by an AF Form 3070, Record of Nonjudicial Punishment Proceedings, dated 17 Jun 97.

3. This action could result in your separation with an Under Other Than Honorable Conditions (UOTHC) discharge. I am recommending that you receive a general discharge. The commander exercising Special Court Martial (SPCM) jurisdiction, or a higher authority, will make the final decision in this matter. If you are discharged, you will be ineligible for reenlistment in the Air Force and any special pay, bonus, or education assistance funds may be subjected to recoupment.

4. You have the right to:

- a. Consult legal counsel.
- b. Present your case to an administrative discharge board.
- c. Be represented by legal counsel at a board hearing.
- d. Submit statements in your own behalf in addition to, or in lieu of, the board hearing.
- e. Waive the above rights. You must consult legal counsel before making a decision to waive any of your rights.

5. You have the right to consult counsel. Military legal counsel has been obtained to assist you. An appointment has been scheduled for you to consult Captain [REDACTED] at the Pope AFB NC Area Defense Office on 20 Nov 00 at 0830 hours. Instead of the appointed counsel, you may have another, if the lawyer you request is in the active military service and is reasonably available as determined according to AFI 51-201. In addition to military counsel, you have the right to employ civilian counsel. The Air Force does not pay expenses incident to the employment of civilian counsel. Civilian counsel, if employed, must be readily available.

6. **Confer with your counsel and reply, in writing, within 7 workdays, specifying the rights you choose to exercise.** The statement must be signed in the presence of your counsel who will also sign it. If you waive your right to a hearing before an administrative discharge board, you may submit written statements in your own behalf. I will send the statements to the discharge authority with the case file to be considered with this recommendation. If you fail to respond, your failure will constitute a waiver of the right to the board hearing.
7. 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 at the orderly room.
8. If you request a board and you fail to appear without good cause, your failure to appear constitutes a waiver of your right to be present at the hearing.
9. The discharge board or, the discharge authority will make the finding and recommendations required under 10 U.S.C. 2005(g).
10. Execute the attached acknowledgment and return it to me immediately.


Major, USAF
Commander

Attachments:

1. LOR, dated 6 Nov 00
2. AF Form 1359, 5 Oct 00
3. LOR, dated 1 Feb 99
4. AF Form 174, dated 3 Dec 98
5. AF Form 174, dated 17 Nov 98
6. AF Form 174, dated 6 Jul 98
7. AF Form 3070, dated 17 Jun 97