

# AIR FORCE DISCHARGE REVIEW BOARD HEARING RECORD

NAME OF SERVICE MEMBER (LAST, FIRST MIDDLE INITIAL) <div style="background-color: black; width: 100%; height: 15px;"></div>			GRADE <b>AB</b>		AFSN/SSAN <div style="background-color: black; width: 100%; height: 15px;"></div>	
TYPE GEN		PERSONAL APPEARANCE			<b>X</b> RECORD REVIEW	
COUNSEL YES No		NAME OF COUNSEL AND OR ORGANIZATION <div style="border: 1px dashed black; width: 100%; height: 20px;"></div>			ADDRESS AND OR ORGANIZATION OF COUNSEL <div style="border: 1px dashed black; width: 100%; height: 20px;"></div>	
<b>X</b>						
MEMBER SITTING				VOTE OF THE BOARD		
				HON	GEN	UOHC
						OTHER
						DENY
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ISSUES <b>A92.15 A01.13 A92.37</b>		INDEX NUMBER <b>A67.90</b>		EXHIBITS SUBMITTED TO THE BOARD		
				<b>1</b> ORDER APPOINTING THE BOARD		
				<b>2</b> APPLICATION FOR REVIEW OF DISCHARGE		
				<b>3</b> LETTER OF NOTIFICATION		
				<b>4</b> 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 <b>30 Jul 2004</b>		CASE NUMBER <b>FD-2004-00072</b>				
APPLICANT'S ISSUE AND THE BOARD'S DECISIONAL RATIONALE ARE DISCUSSED ON THE ATTACHED AIR FORCE DISCHARGE REVIEW BOARD DECISIONAL RATIONALE						
<p>Case heard at Washington, D.C.</p> <p>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.</p> <div style="border: 1px dashed black; width: 100%; height: 50px; margin-top: 20px;"></div>						
INDORSEMENT				DATE: 8/2/2004		
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-2004-00072**

**GENERAL:** The applicant appeals for upgrade of discharge to honorable and to change his reenlistment code.

The applicant was offered a personal appearance before the Discharge Review Board (DRB) 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 and 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 of discharge.

**ISSUES:**

Issue 1. Applicant contends discharge was inequitable because it was too harsh. The records indicated the applicant received two Articles 15 for misconduct, consisting of having a sexual relationship with the wife of another airman, violating a no contact order with the other airman, and driving while intoxicated. Applicant now contends that he did not have a sexual relationship with the female in question, nor did he drive drunk due to his motorcycle being inoperable; he claimed he was pushing it back to base. Nevertheless, the record clearly shows that member admitted his unlawful relationship with the other airman's wife in paragraphs 4 and 5 of his (member's) very lengthy reply to the Article 15. As regards the drinking and driving incident, the Nevada Highway Patrol trooper's report clearly states that he observed member "slow down in front of my patrol vehicle then pull off the roadway . . . ." Additionally, member spent 2 days in civil confinement incident to this arrest. The DRB opined that through the unit's administrative actions, the applicant had ample opportunities to change his negative behavior and was unwilling or unable to do so. The Board concluded the misconduct was a significant departure from conduct expected of all military members. The characterization of the discharge received by the applicant was found to be appropriate.

Issue 2. Applicant states that his discharge did not take into account the good things he did while in the service. The DRB took note of the applicant's duty performance as documented by his performance reports, letters of recommendation and other accomplishments. They found the seriousness of the willful misconduct offset any positive aspects of the applicant's duty performance. The Board concluded the discharge was appropriate for the reasons which were the basis for this discharge.

**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

[REDACTED]  
[REDACTED]  
(Former AB) (HGH SRA)

1. **MATTER UNDER REVIEW:** Appl rec'd a GEN Disch fr Nellis AFB, NV on 20 Aug 99 UP AFI 36-3208, para 5.50.2 (Pattern of Misconduct - Conduct Prejudicial to Good Order and Discipline). Appeals for Honorable Discharge and to Change the RE Code.

2. **BACKGROUND:**

a. DOB: 21 Apr 78. Enlmt Age: 18 4/12. Disch Age: 21 3/12. Educ: HS DIPL. AFQT: N/A. A-79, E-81, G-96, M-74. PAFSC: 3E831 - Explosive Ordinance Disposal Apprentice. DAS: 29 Jul 97.

b. Prior Sv: (1) AFRes 18 May 96 - 3 Sep 96 (3 months 16 days) (Inactive).

3. **SERVICE UNDER REVIEW:**

a. Enlisted as AB 4 Sep 96 for 6 yrs. Svd: 2 Yrs 11 Mo 17 Das, of which AMS is 2 Yrs 11 Months 15 Days (excludes 2 days lost time).

b. Grade Status: AB - 15 Jun 99 (Article 15, 15 Jun 99)  
AMN - 25 Mar 99 (Article 15, 25 Mar 99)  
SRA - 19 Feb 99  
A1C - (EPR Indicates): 4 Sep 96-3 May 98

c. Time Lost: 4 May 99 thru 5 May 99 (2 days).

d. Art 15's: (1) 15 Jun 99, Nellis AFB, NV - Article 111. You, did, on or about 3 May 99, at or near the intersection of Interstate 15 and Craig Road, Las Vegas, Nevada, physically control a vehicle, to wit: a motorcycle, while drunk, as evidenced by the alcohol concentration in your blood being 10 grams of alcohol per 100 milliliters of blood or greater, as shown by chemical analysis. Reduction to AB, and 14 days extra duty. (Appeal/Denied) (No mitigation)

(2) 25 Mar 99, Nellis AFB, NV - Article 92. You, having knowledge of a lawful order issued by CMSgt [REDACTED] to wit: you are hereby ordered to have no contact with SrA [REDACTED] other than professional contact during normal duty hours or words to that effect, dated 16 Feb 99, an order which it was your duty to obey, did, at or near Las Vegas, Nevada, on or about 1 Mar 99, fail to obey the same by wrongfully going to SrA [REDACTED] off duty residence. Article 134. You, did, between on or about 1 Aug 98 to on or about 14 Feb

99, wrongfully have sexual intercourse with [REDACTED]  
[REDACTED] a married woman not your wife. Reduction to  
Airman, 30 days restriction, and 30 days extra duty.  
(Appeal/Denied) (No mitigation)

e. Additional: None.

f. CM: None.

g. Record of SV: 4 Sep 96 - 03 May 98 Nellis AFB 5 (Initial)  
4 May 98 - 31 Jan 99 Nellis AFB 5 (CRO)

h. Awards & Decs: AAM, AFTR.

i. Stmt of Sv: TMS: (3) Yrs (3) Mos (0) Das  
TAMS: (2) Yrs (11) Mos (15) Das

4. **BASIS ADVANCED FOR REVIEW:** Appln (DD Fm 293) dtd 19 May 04.  
(Change Discharge to Honorable and Change the RE Code.)

ISSUES ATTACHED TO BRIEF.

**ATCH**

1. Applicant's Issues with Tabs 1-14.

26MAY04/ia



## DEPARTMENT OF THE AIR FORCE

99TH CIVIL ENGINEER SQUADRON (ACC)  
NELLIS AIR FORCE BASE, NEVADA

FW 2004-00016

22 JUL 1999

MEMORANDUM FOR AB [REDACTED] 99 CES

FROM: CCQ

SUBJECT: Notification Memorandum - Administrative Discharge AFI 36-3208

1. I am recommending your discharge from the United States Air Force for a pattern of misconduct, specifically conduct prejudicial to good order and discipline. The authority for this action is AFDP 36-32 and AFI 36-3208, paragraph 5.50.2. If my recommendation is approved, your service may be characterized as honorable, general, or under other than honorable conditions (UOTHC). I am recommending that your service be characterized as general.
2. My reasons for this action are:
  - a. On or about 3 May 99, you did at or near Las Vegas, NV, at or near the intersection of Interstate 15 and Craig Road, Las Vegas, NV, physically control a vehicle, to wit: a motorcycle, while drunk, as evidenced by the alcohol concentration in your blood being .10 grams of alcohol per 100 milliliters of blood or greater as shown by chemical analysis. For your actions, you were punished under Article 15, UCMJ, on 15 Jun 99 and received one day lost time due to being in civilian confinement (see attached AF Fms 2098, Duty Status Change);
  - b. On or about 1 Mar 99, you failed to obey a lawful order dated 16 Feb 99, not to have any contact with SrA [REDACTED] other than professional contact during normal duty hours or words to that effect. You did on 1 Mar 99 go to SrA [REDACTED] off-base residence in violation of that order. For your actions, you were punished under Article 15, UCMJ, on 25 Mar 99 and an unfavorable information file (UIF) was initiated; and
  - c. Between on or about 1 Aug 98 and on or about 14 Feb 99, you did wrongfully have sexual intercourse with [REDACTED] a married woman not your wife. For your actions, you were punished under Article 15, UCMJ, on 25 Mar 99 and a UIF was initiated.
3. Copies of the documents to be forwarded to the separation authority in support of this recommendation are attached. The commander exercising special court-martial jurisdiction or a higher authority 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.

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 the Area Defense Counsel at Bldg 625 on 23 JUL 99 at 0900 hours. You may consult civilian counsel at your own expense.

5. You have the right to submit statements in your own behalf. **You have three (3) duty days (72-hours from the date/time served) to submit statements in your behalf.** Any statements you want the separation authority to consider must reach me by 27 JUL 99 at 1430 hours unless you request and receive an extension for good cause shown. I will send them to the separation authority.

6. In the event the commander exercising Special Court-Martial jurisdiction or a higher authority approves your discharge, separations will out-process you. Your initial separations briefing is scheduled for 26 JUL 99 on 1000 HRS. (WITH ESCORT)

7. If you fail to consult or to submit statements in your own behalf, your failure will constitute a waiver of your right to do so.

8. You have been scheduled for a medical examination at the 99th Medical Group on 19 Jul 99 at 0900.

9. 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 your Unit Orderly Room.

10. Execute the attached acknowledgment and return it to me immediately.

  
Squadron Section Commander

Attachments:

1. Article 15, UCMJ, 15 Jun 99 w/atchs
2. AF 2098, Duty Status Change, 5 May 99
3. AF 2098, Duty Status Change, 4 May 99
4. Article 15, UCMJ, 25 Mar 99 w/atchs
5. UIF, Mar Article 15 incident

## CONTINUATION OF DD 293

[REDACTED] by and through his undersigned counsel, requests that this Honorable Board upgrade the characterization of discharge from General (Under Honorable Conditions) to an Honorable characterization of discharge. The factual, legal and equitable bases for this request are set forth herein.

**Facts Relevant to Application**

[REDACTED] enlisted in the United States Air Force on September 4, 1996. After Basic Training, then-Airman [REDACTED] was assigned to training as an Explosive Ordnance Disposal Technician, 3E831. Airman [REDACTED] was the "Distinguished Honor Graduate" for his EOD school class and he achieved a 93 percent grade average. In short order, Airman [REDACTED] was promoted to Airman First Class. His performance evaluations as an Airman First Class rate him as an "outstanding performer in every aspect of duty." See EPR for Period 4 Sep 96 through 3 May 98 (attached hereto at Tab 1).

A1C [REDACTED] later demonstrated his coolness in pressure situations as a first responder to the crash site of two MH-60 Blackhawk helicopters which had collided mid-air at the Nellis ranges. A1C [REDACTED] assisted with firefighting, removal of the remains of the dead crews and cleared all explosive hazards from the crash area. His performance in this regard was noted on his EPR for the period 4 May 98 to 31 Jan 99. See EPR for Period 4 May 98 through 3 May 98 (attached hereto at Tab 2). Further, A1C [REDACTED] efforts in the gruesome recovery of the accident victims' remains was rewarded with the award of the Air Force Achievement Medal (attached hereto at Tab 3).

Throughout his enlistment, A1C [REDACTED] record demonstrates consistently excellent performance. He was named a member of the Superior Performance Team for his participation in a "Broken Arrow" exercise simulating recovery of a weapon after an aircraft crash; nominated to be a candidate for the Nellis AFB USAF Pre-Ranger Course; received a Letter of Appreciation for his performance of duties in the 99<sup>th</sup> CES Utilities Shop. See documents attached hereto at Tab 4. Throughout his enlistment, A1C [REDACTED] completed numerous training schools as reflected in the completion certificates attached hereto at Tab 5.

After his involuntary discharge from the United States Air Force, Mr. [REDACTED] has continued to train and work in the EOD field. He has been inducted into the International Association for Counterterrorism and Security Professionals and has received a Certificate of Appreciation for his contributions to the U.S. Army Corps of Engineers support for protracted combat operations of the Combined Forces Land Component Command during Operation Enduring Freedom and Operation Iraqi Freedom, from April 14, 2003 through October 31, 2003. See Documents attached at Tab 6. Thus, notwithstanding his discharge from the U.S. Air Force, Mr. [REDACTED] has continued to serve his country by supporting the land combat forces engaged on the ground overseas in the combat areas engaged in the War on Terrorism.

#### *Reasons for Discharge*

On or about 16 February 1999, A1C [REDACTED] was given a written order to have no contact under any circumstances with the wife of SrA [REDACTED]. That same date, A1C [REDACTED] acknowledged the order. See Memorandum dtd 16 Feb 99 (attached hereto at Tab 7). Thereafter, based on allegations



from SrA [REDACTED] friends, A1C [REDACTED] was notified that his commander intended to impose Article 15, UCMJ punishment for adultery and violation of a lawful order to have no contact with SrA [REDACTED]. See Article 15, AF Form 3070 (attached hereto at Tab 8).

At his Article 15, A1C [REDACTED] denied the allegations that he had engaged in adultery or that he had knowingly violated an order relating to SrA [REDACTED]. See A1C [REDACTED] response to Article 15 and Memo from his ADC (attached hereto at Tab 8). Nonetheless, punishment was imposed by the Commander, including, reduction in rank to Airman, and restriction to Nellis AFB for 30 days and Extra duties for 30 days. A1C [REDACTED] appealed the Article 15, however, his appeal was denied. See AF Form 3070 (Tab 8).

Thereafter, after attending a concert off base with his friends, Airman [REDACTED] came out of the concert to find his motorcycle had been vandalized and would not start or run. After unsuccessfully seeking assistance from friends with pick-up trucks, Airman [REDACTED] began to push his motorcycle back to base. See Statement of [REDACTED] [REDACTED] (attached hereto at Tab 9).

While engaged in the pushing of his motorcycle along the highway, a Nevada State Trooper pulled over to investigate and determined that A1C [REDACTED] had been drinking and arrested him on suspicion of DUI. *Id.* Thereafter, the civil charges were dismissed due to failure of proof that A1C [REDACTED] had actually *operated* his motorcycle while drunk. (The evidence showed that the motorcycle was incapable of operation as a result of the damage; see Repair Work Order (Tab 10)). The Air Force, however, proceeded to process Airman [REDACTED] for another Article 15.

At the Article 15, Airman [REDACTED] denied operation of the motorcycle while drunk. The Commander imposed punishment, including reduction to Airman Basic and 14 days of extra duty. See Article 15, AF Form 3070 (attached hereto at Tab 11). In due course, Airman [REDACTED] appealed the Article 15 and his appeal was denied. *Id.*

On 22 July 1999, Airman [REDACTED] was notified that he was being processed for discharge for misconduct based upon a pattern of misconduct and that the least favorable characterization of service he might receive – if provided an administrative discharge board – was an Under Other Than Honorable Conditions characterization. See Discharge Package (attached hereto at Tab 12). Airman [REDACTED] provided a written statement in response to the proposed discharge recognizing that he would be discharged and requesting that he receive an Honorable characterization of discharge. On August 20, 1999, Airman [REDACTED] was involuntarily separated from the Air Force with a “General Under Honorable Conditions” characterization of discharge. He was awarded an RE-2B re-entry code and a separation code of JKM. The narrative reason for his discharge was “misconduct.” See DD 214 (attached hereto at Tab 13).

#### Discussion

Mr. [REDACTED] should not have been discharged and should not have been issued a characterization of discharge of General Under Honorable Conditions. Rather, if he was to be discharged, he should not have been awarded any less than an Honorable characterization of discharge.

First, other than the two Article 15's, Mr. [REDACTED] record demonstrates excellent and honorable performance fully worthy of an Honorable characterization of discharge. His EPRs show honest, faithful and dedicated work fully supporting the Air

Force mission. Demonstrating his honorable service are the Rater's and Indorser's recommendations for immediate promotion to Staff Sergeant. See EPRs (Tab 1 & Tab 2).

Second, the evidence is clear that the Article 15 punishments were unjust because they were not supported by even a preponderance of the evidence. AFI 51-202 provides that Article 15 should not be imposed unless the charges could be proven at court-martial beyond a reasonable doubt. See AFI 51-202 ¶ 3.4. The evidence now available to Mr. [REDACTED] clearly shows that this standard has not been met.

With respect to the adultery allegation, MR. [REDACTED] was charged with engaging in adultery – committing sexual intercourse – with [REDACTED]. In or about 20 August 1999, [REDACTED] provided a written, signed statement not provided to Mr. [REDACTED] until he obtained it in a FOIA request. In that written statement, [REDACTED] stated that “we did not have a sexual affair of any nature during the course of my marriage to [REDACTED] . . . I only stated that I was involved with him for fear of reprisal.” See Memo for Record dtd 20 Aug 1999. (attached hereto at Tab 14).

Concerning the allegation that Mr. [REDACTED] violated an order to have no contact with SrA [REDACTED], it is clear that the written order provided to Mr. [REDACTED] contained no requirement that he have no contact with SrA [REDACTED] only that Mr. [REDACTED] have not contact with SrA [REDACTED] wife. As explained by Mr. [REDACTED] at the time of the Article 15 and also by his ADC in her memorandum, Mr. [REDACTED] did not believe the suggestions that he stay “out of the way” of SrA [REDACTED] constituted an order. See ADC Memo (Tab 8) and [REDACTED] Statement (Tab 8).

It is well established that to be guilty of a violation of an order, the accused must have actual knowledge of the order. Knowledge cannot be inferred. Moreover, it is

equally well established that an honest mistake of fact is a complete defense to the charge of willful disobedience of an order. The mistake need not even be reasonable, so long as it was an honest mistake. *See* R.C.M. 916(j), MCM, United States, Part II-113 (1998 ed.); Military Judge's Benchbook, DA PAM 27-9 ¶¶ 5-11; 5-11-1. Mr. [REDACTED] maintained from the very beginning that he did not believe he had been given a no contact order with SrA [REDACTED]. His conclusion was not only honest but also reasonable because had such intent actually been intended by CMSgt [REDACTED] such intent surely would have been reflected in the written order that he provided to A1C [REDACTED] at the time. That no mention was made of "no contact" with SrA [REDACTED] corroborates Mr. [REDACTED] contemporaneous statement that he did not believe he had been given such an order. Under these circumstances, punishment should not have been imposed upon A1C [REDACTED].

Similarly, imposition of punishment under Article 15 for DUI was improper because the motorcycle that Mr. [REDACTED] was pushing was incapable of being "operated." It had been vandalized and was inoperable. *See* Statement of [REDACTED] (Tab 9); *see also* Work Order (Tab 10). Accordingly, Mr. [REDACTED] should not have had Article 15 punishment imposed upon him for DUI in the "operation" of an inoperable and non-functioning motorcycle.

With respect to the discharge action, Mr. [REDACTED] was denied the opportunity to have his case heard by an administrative discharge board. Although he was notified that the least favorable characterization he might receive was Under Other Than Honorable Conditions, no Administrative Discharge Board was convened to hear the evidence in his case. Instead, to avoid appointment of competent counsel who might

have made a convincing case for "no misconduct" and retention, the command recommended a General Under Honorable Conditions characterization that obviated Mr. [REDACTED] right to a discharge board. It is respectfully urged that had Mr. [REDACTED] been provided a fair and impartial fact-finder to consider and evaluate the evidence claimed to support "a pattern of misconduct," it is unlikely that he would have been discharged at all because the evidence would not meet the preponderance of the evidence standard required to establish the "pattern" nor for separation from the Air Force.

Because the evidence of misconduct failed to meet the threshold for a finding of misconduct, much less a "pattern of misconduct" the administrative discharge of Mr. [REDACTED] was legal error and injustice entitling him to relief and a characterization of discharge of "Honorable."

#### Conclusion

Based upon the foregoing, it is respectfully requested that this Honorable Board grant [REDACTED] relief in the nature of a change to his characterization from "General Under Honorable Conditions" to "Honorable" and change of his re-enlistment Code to RE-1.

Respectfully submitted,

[REDACTED]  
[REDACTED]  
(VA State Bar 28048)

Law Offices of [REDACTED] PC

[REDACTED]  
Middletown, VA 22645

(813) [REDACTED]  
(540) [REDACTED] (fax)

Counsel for [REDACTED]