

AIR FORCE DISCHARGE REVIEW BOARD HEARING RECORD

(LAST, FIRST, MIDDLE INITIAL)	GRADE AB
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TYPE GEN	PERSONAL APPEARANCE	X	RECORD REVIEW
COUNSEL		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	A94.06	INDEX NUMBER	A67.50	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	CASE NUMBER	
01 Feb 2005	FD-2004-00306	

APPLICANT'S ISSUE AND THE BOARD'S DECISIONAL RATIONALE 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.

Names and votes will be made available to the applicant at the applicant's request.

[Handwritten Signature]

INDORSEMENT		DATE: 2/1/2005
TO:	FROM:	
SAF/MRBR 550 C STREET WEST, SUITE 40 RANDOLPH AFB, TX 78150-4742	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-2004-00306

GENERAL: The applicant appeals for upgrade of discharge to honorable, to change the reason and authority for the discharge, and to change the 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: The Board grants partial relief; the discharge is upgraded to honorable.

The Board finds that neither the evidence of record nor that provided by applicant substantiates an impropriety that would justify a change of discharge. However, based upon the record and evidence provided by applicant, the Board finds the applicant's discharge inequitable.

Issue 1. Applicant contends discharge was inequitable because it was too harsh. The records indicated the applicant received two Articles 15 for misconduct, separated by a 15-month period. His first Article 15 was for underage drinking and failure to go. The last one was for off-base public indecency and reckless driving. Applicant disputed the validity of the second Article 15 claiming that the elements of the alleged offenses were not satisfied and he had not willfully committed the acts. Because of his claimed innocence, he felt discharge was too harsh. With regard to this Article 15, the DRB disagreed with the applicant's assertions, and concluded the misconduct was a significant departure from conduct expected of all military members. The characterization of applicant's discharge based on this alone might otherwise have been found to be appropriate were it not for a separate set of circumstances, as reflected in Issue 2 below.

Issue 2. The record reflects that part of member's punishment on his first Article 15 was a 30-day restriction to base. Member was subsequently tried by Special Court Martial on two specifications, for allegedly violating restriction to base, and making a false official statement regarding his whereabouts. He pled not guilty, and was found not guilty, to both charges. Nevertheless, he remained assigned to base details and was never returned to his primary duties or any other career field duties for the 13-month period until his discharge. It was during the 9th month of being assigned to base details that his second Article 15 offenses occurred off base. After the local police transferred jurisdiction to the base, member received the Article 15 and was recommended for discharge. While the DRB did not condone applicant's misconduct, they took note of the applicant's duty performance and concluded it was inequitable to fail to return him to his primary duties or other similar duties following his court martial acquittal. Failure to do so may have contributed to his subsequent incident of misconduct. The Board therefore concluded the characterization of discharge was inequitable on this basis alone. The Board did not however feel there was sufficient basis on which to change the reason and authority for the discharge, or to change applicant's reentry code.

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.

However, in view of the foregoing findings, the Board further concludes that the overall quality of applicant's service is more accurately reflected by an Honorable discharge. The applicant's characterization should be changed to Honorable under the provisions of Title 10, USC 1553.

Attachment:

Examiner's Brief

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

[REDACTED]

(Former AB) (HGH A1C)

MISSING DISCHARGE DOCUMENTS

1. **MATTER UNDER REVIEW:** Appl rec'd a GEN Disch fr Holloman AFB, NM on 29 Jan 99 UP AFI 36-3208, para 5.50 (Pattern of Misconduct). Appeals for Honorable Discharge, and to Change the RE Code, Reason and Authority for Discharge.

2. **BACKGROUND:**

a. DOB: 17 Jul 77. Enlmt Age: 18 2/12. Disch Age: 21 6/12. Educ: HS DIPL. AFQT: N/A. A-Unknown, E-Unknown, G-Unknown, M-Unknown. PAFSC: 1N031 - Intelligence Application Apprentice. DAS: Unknown.

b. Prior Sv: (1) AFRes 19 Sep 95 - 2 Apr 96 (6 months 15 days) (Inactive).

3. **SERVICE UNDER REVIEW:**

a. Enlisted as AB 3 Apr 96 for 4 yrs. Svd: 2 Yrs 9 Mo 27 Das, all AMS.

b. Grade Status: AB - 16 Nov 98 (Article 15, 16 Nov 98)
Amn - 26 Aug 97 (Article 15, 26 Aug 97)
A1C - Unknown
Amn - Unknown

c. Time Lost: None.

d. Art 15's: (1) 16 Nov 98, Holloman AFB, NM - Article 111. You did, at or near Tularosa, New Mexico, on or about 10 Oct 98, at or near the 500 block of St. Francis Street, operate a vehicle, to wit: a 1997 Dodge Neon, in a reckless manner by wrongfully driving your vehicle in the oncoming lane of traffic on St. Francis Street. Article 134. You did, at or near Tularosa, New Mexico, on or about 10 Oct 98, while in the driver's side of your 1997 Dodge Neon, willfully and wrongfully expose in an indecent manner to public view, your genitals. Reduction to AB, forfeiture of \$100.00 pay, and 20 days extra duty. (Appeal/Denied) (No mitigation)

(2) 26 Aug 97, Holloman AFB, NM - Article 92. You, who knew or should have known of your duties, on or about 17 Jul 97, were derelict in the performance of those duties in that you willfully failed to refrain from drinking alcoholic beverages while under the age of 21 years, as it was your duty to do. Article 86. You did, on or about 17 Jul 97, without authority, fail to go at the time prescribed to your appointed place of duty.

Article 107. You did, with the intent to deceive, make to SMSgt [REDACTED], an official statement, to wit: "I have not been drinking at any time since the flight social event," or words to that effect, which statement was totally false and was then known by you to be so false. Reduction to Airman, 30 days restriction, and a reprimand. (No appeal) (No mitigation)

e. Additional: Unknown.

f. CM: Unknown.

g. Record of SV: Unknown.

h. Awards & Decs: AFTR, AFOUA W/1 BOLC.

i. Stmt of Sv: TMS: (3) Yrs (4) Mos (11) Das
TAMS: (2) Yrs (9) Mos (27) Das

4. **BASIS ADVANCED FOR REVIEW:** Appln (DD Fm 293) dtd 28 Jul 04.
(Change Discharge to Honorable, and Change the RE Code, Reason and Authority for Discharge)

ISSUES ATTACHED TO BRIEF.

ATCH

1. Applicant's Issues.
2. Statement of Material Contentions.
3. Supplemental Report.
4. Police Report.
5. Two Police Officer Statements.
6. Blood Alcohol Test Results.
7. Traffic Citation.
8. Record of Nonjudicial Punishment.
9. Tularosa Map & Descriptions.

7SEP04/ia

TIME CONSIDERATIONS

Applicant was discharged from the Air Force on January 1999, based on the charges that are being claimed to be unjust or in error (Incident for which discharge took place occurred on 10 October 1998). Understanding that there is a 3 year time limit for review by the AFBCMR, applicant requests for the AFBCMR to consider the allegations for relief because it is in the interest of justice and offers the statements provided as the factors that inhibited applicant from pursuing corrective action within the time frame permitted.

1. Shortly after discharge (Jan. 1999) applicant was diagnosed with a mental illness and consequently committed to a psychiatric institution. Such condition prohibited applicant from exercising rational judgment as to completing day to day activities and was the factor of applicant not being able to make such corrective claims to the AFBCMR for its consideration within the specified time period allowed. It has only been recently that applicant's condition has improved to such a state to allow applicant to pursue corrective claim action through the AFBCMR.

2. It is in the interest of justice for the AFBCMR to consider applicant's request for review. In the applicant's submission informational brief, applicant states that an error or injustice took place in that the Art. 15 tribunal incorrectly applied a violation of articles even though they did not meet the requirement for reckless driving (as to art. 111) and did not follow standard set forth by jurisprudence as to what military justice has considered to be indecent exposure.

Applicant prays that the AFBCMR accept the explanation provided as to the reasons why applicant was unable to file for corrective action within the time limit permitted and hears applicant's allegations for relief.

PERSONAL STATEMENT

I joined the US Air Force after my graduation from high school, following in the line of military service of my father and grandfather who both served in the army. I did not feel that, at the time, college was appropriate for me. A sense of duty and adventure is what attracted me to the US Air Force and after speaking with the Air Force recruiter, in which I showed interest in the intelligence career field, I enlisted. For I believed, as I do today, that the military is a great opportunity for people to travel, meet new people, learn new skills among a host of other possibilities that are open to those who want to serve all the while showing patriotism to this country.

After 6 months of inactive deferred enlistment, I finally entered active duty service on April 1996. After basic training completion I was pleased to find out that my request for apprenticeship to the intelligence applications program had been granted. Graduating from the intelligence applications school at Goodfellow AFB, this has been one of my proudest moments in my life. I was assigned to duty at Holloman AFB New Mexico, attached to the 49 Operations Support Squadron (OSS) 8th targets intelligence section. Things were relatively good. I was proud to serve my country and enjoyed my job and did well in it. Passing my intelligence applications examinations (CDC's) and obtaining recognition for excellence involving operational exercises. Also, shortly after assignment, I began to attend college at New Mexico State University (NMSU-A) and had accumulated over 60 units majoring in political science.

On July 17 1997 I exercised poor judgement and consumed alcoholic beverages to mark my 20th birthday. Such consumption was an influence of my tardiness for duty that morning and while in such error, I denied drinking when I was confronted. I took full responsibility for my actions, acknowledging my drinking incident and seeking rehabilitative counseling. As a consequence to my erroneous behavior I received an Art. 15, in which it stipulated a reduction of rank from E-3 to E-2 and a 30 day on base restriction. While complying with the stipulations of the Art. 15 (on base restriction) I was falsely accused of violating said stipulation. I denied the allegation and a court martial proceeded. Immediately, during this time, I was taken of intelligence duty and put to work in the Consolidated Dorm Management (CDM) department (CDM was under the Civil Engineering Squadron (CES)) assigned cleaning duties in the dormitories, with renewal assignment to CDM being ordered weekly by my squadron (OSS). My rapport and relationship with my duty squadron (49 OSS), in particular higher command to include my first sergeant, plummeted and contact was

cut off, forever ending any future reconciliation between us.

I was acquitted of the charges in the court marshal. When I continued to be assigned to janitorial duties at CDM, after court marshal acquittal, I protested stating that the court marshal determined that the allegations against me were false and without merit and that I should be reassigned back to my career field duty station. For the intelligence flight had no further basis for punitive assignment: and thus such assignment was unjust. My claims for reassignment fell on deaf ears.

Seeing that my request for reassignment to duty in my career field, post court marshal acquittal, was going nowhere I requested for permanent assignment to the 49 Civil Engineering Squadron CDM personnel flight. Already establishing rapport with CDM personnel, due to contact from cleaning assignment, and noting my strong work ethic I was approved for reassignment by CES squadron commander [REDACTED]. I joined CDM personnel and was now part of the out-process inspection team for the dormitories at Hollowman AFB. During this time I received good progress reports and was awarded the meritorious unit ribbon all the while I continued with my education at NMSU college.

At the end of the following year, in 1998, is when the incident in question took place. On Oct. 10 1998 I, accompanied by my girlfriend, went to a local bar on the outskirts of the village of Tularosa. Leaving the establishment around 3:30 AM, after having consumed a few drinks, with the intention of heading back to my girlfriends house in Alamogordo, which is roughly 6 miles south of Tularosa. When we entered the vehicle we briefly got intimate and during this time is when I took off my pants (still wearing my thermal shirt). The brief intimate encounter lasted less than 3 minutes (a few embraces, I took my pants off and then started the ignition). From which I began to drive to her house, as it was always the intention, to conclude the encounter. Unfortunately I failed to put back on my pants while I was driving back to my girlfriends house, rationalizing that this was in the spurt of the moment, and the actual drive would only take 7-8 minutes, that it was night time and would be traveling inside a car with my shirt on, I did not put my pants back on.

I drove through the village of Tularosa, on my way to Alamogordo. Driving, at that time in the proper lane for traffic, following the gradual curving of the road to the left (curving southbound) is when the incident took place. In that particular moment my girlfriend suddenly reached over from the right side (passenger) and embraced me while in the course of driving. Such action, the sudden embrace from my right side, consequently made me steer to the left. This action caused me to drive off course to the lane for on coming traffic for 3-5 seconds. This 3-5 seconds was the time it took me to make corrective action to steer the vehicle back to the

designated lane for traffic.

It was this action that the Tularosa police officer witnessed and therefore pulled me over. I was asked to show my drivers licence, registration and my proof of insurance. I gave the officer my military ID, for that was in my immediate grasp (my wallet which contained my drivers licence was in the back seat inside the pants that I had previously taken off) and began to reach to the back to obtain my drivers licence and to retrieve my pants, all the while my passenger is obtaining the registration and proof of insurance documentation from the glove compartment. At this time is when the officer asked if I had been drinking to which I replied that I had. At that point the officer no longer appeared to be interested in seeing my documentation and asked me to step out of the vehicle. I reached in the back seat for my pants and put them on before I got out of the vehicle. The officer asked me, once I got out, how much I had to drink and I replied that I had drank a few drinks about 2-3. The officer then proceeded to do a series of field sobriety tests.

Officer [REDACTED] was unsatisfied with my response to the sobriety test and placed me under arrest. Shortly afterwards, more police officers arrived on scene and I was given another field sobriety test by a more senior officer (Sheppard). I passed the test to the senior officers satisfaction, and as a consequence the senior officer stated that only a ticket (infraction) was necessary. It was then that the ranking official made the decision, shortly after the second sobriety test. [REDACTED] stated that since the arresting officer had already placed me under arrest (ei had read me my rights) to go ahead and proceed with the arrest. I was booked in the city of Alamogordo and given an alcohol breath test. The result of my blood alcohol content (BAC) resulted in 0.04 and consequently the DWI charges were dropped. The village of Tularosa transferred jurisdiction to Holloman AFB and consequently I was charged with the articles that are now in question. That is a summary of the events that took place.

I, acting on the advice of counsel [REDACTED] area defense), opted for Art. 15 proceedings and the commander of the 49th CES squadron which I was attached to [REDACTED] presided over the hearing. I claimed that I was not guilty of the charges brought up against me (violation to Art. 111&134 respectively). Stating, in relation to the Art. 111 charge, that it was not my fault and it did not meet the specifications to be found guilty of said article. In relation to the Art. 134 charge, I claimed that the allegation never took place for I never exposed myself indelicately (genitalia or otherwise) to public view, nor did the incident constitute charge under the article.

[REDACTED] disagreed and found me guilty of the charges handing down the punishment of reduction of grade, a monetary fine and 30 days extra duty. I appealed my commanders decision to higher command [REDACTED] logistics overall commander (CES is

under [REDACTED] command). I presented to [REDACTED] my arguments, stating that I was not guilty of the offenses charged. [REDACTED] concurred with [REDACTED] with the initial findings of conviction, although changing the wording of Art. 134 charge and deducting the punitive monetary fine.

Counsel at the time was [REDACTED] (who had recently been assigned to area defense from the prosecuting offices and knew me unofficially from my prior court marshal). I explained to counsel the issues involved and claimed my innocence to the offenses charged. [REDACTED] advised that I should accept Art. 15 proceedings as the legal venue for proceedings instead of the court marshal. Stating that, although she felt that there was a strong basis for argument of the art. 134 charge that the art. 111 charge was arbitrary and would be up to personnel discretionary judgement to decide the matter. Citing that if I took the charges to an court marshal and if they did in fact convict me, even if the only found guilty in the art. 111, I would be discharged unfavorably. By this she meant discharged as a bad conduct or otherwise because court marshalls were more sever than Art.15 proceedings.

I emphatically deny the articles charged. Not only was it not my fault as to art. 111 but I took corrective action to manuevre the vehicle back to the proper lane for traffic. By no means were my actions wanton and willfull as required by art. 111. Nor did my actions support the charge of art. 134 indecent exposure, for I did not expose myself indecently to public view as charged. The article even caused confussion on appeal to [REDACTED] and was reworted to its present form because it did not conform with the specifics of the incident and even in its present form lacks foundation.

When I was informed that I would be administratively discharged from the military due to the articles I was devastated. I felt wronged by conviction of mentioned articles and took this as a personal loss. I sought relief from Holloman AFB Chief First Sergeant, stating that the discharge was unwarranted or at least to harsh. I cited my meritorious service, my recognition in the intelligence field, noted service in CDM, my strong work ethic and commitment to duty, to no avail. I was discharged shortly after. Within the month after discharge I was committed for psychological reasons and continue to be so although my condition is improving.

In the end I am proud of my military service and am glad to have served my country, irregardless of the negative. With this I pray that the AFBCMR grant me the releif that I seek based on the information provided.

FO 2004-00306

I certify that the comments provided are true and accurate to the best of my belief.

Date

