

AIR FORCE DISCHARGE REVIEW BOARD HEARING RECORD

NAME OF SERVICE MEMBER (LAST, FIRST MIDDLE INITIAL) <div style="border: 1px dashed black; height: 20px; width: 100%;"></div>		GRADE AMN	AFSN/SSAN <div style="border: 1px dashed black; height: 20px; width: 100%;"></div>																		
TYPE GEN	PERSONAL APPEARANCE	X	RECORD REVIEW																		
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HEARING DATE 10 May 2005		CASE NUMBER FD-2004-00418																			
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> <p>Names and votes will be made available to the applicant at the applicant's request.</p> <p>+ CHANGE REASON TO ERRONEOUS ENTRY</p>																					
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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-2004-00418

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 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 reason for discharge inequitable.

ISSUES:

Issues 1 & 2. Applicant believes his discharge is improper in that he was the recipient of a constructive waiver of discharge pursuant to AFI 36-3208, paragraph 5.19.3 and his discharge was inequitable in that the grounds used for his discharge were based upon the response to one question in his enlistment paperwork and that response was given only upon the advice of his recruiter. The records indicated the applicant received an Article 15 and a vacation action which subsequently led to a general discharge for fraudulent entry. The member states his recruiter instructed him in completing the AF Form 2030, USAF Drug and Alcohol Abuse Certificate. Prior to enlisting, the member had his criminal convictions expunged and was informed by the State of Utah, he could proceed with his life as if nothing ever happened. Upon his enlistment, the member selected "no" to the question pertaining to his convictions. The Board believed the applicant when he stated he did not intend to mislead the Air Force about his criminal convictions and; therefore, his enlistment was erroneous rather than fraudulent. That being the case, the Board opined that a general discharge is too harsh and his discharge characterization should be changed to honorable.

Issue 3. The issue of reinstatement is not under the purview of the Air Force Discharge Review Board and not addressed.

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 and the reason for the discharge is more accurately described as Erroneous Entry 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

(Former AMN) (HGH A1C)

MISSING DISCHARGE SOME DOCUMENTS

1. **MATTER UNDER REVIEW:** Appl rec'd a GEN Disch fr Tinkier AFB, OK on 6 Feb 02 UP AFI 36-3208, para 5.13.4 (Fraudulent Entry). Appeals for Honorable Discharge, and to Change the RE Code, Reason and Authority for Discharge.

2. **BACKGROUND:**

a. DOB: 6 Jun 72. Enlmt Age: 27 5/12. Disch Age: 29 8/12. Educ: HS DIPL. AFQT: N/A. A-40, E-54, G-41, M-77. PAFSC: 2A551L - Aerospace Maintenance Technician. DAS: 21 Apr 00.

b. Prior Sv: (1) AFRes 30 Nov 99 - 25 Jan 00 (1 month 26 days) (Inactive).

3. **SERVICE UNDER REVIEW:**

a. Enlisted as AB 26 Jan 00 for 6 yrs. Svd: 2 Yrs 0 Mo 12 Das, all AMS.

b. Grade Status: Amn - 14 Nov 01 (Vacation of Article 15, 14 Nov 01)
A1C - 28 Jul 00

c. Time Lost: None.

d. Art 15's: (1) 14 Nov 01, Vacation, Tinker AFB, OK - Article 86. You did, on or about 27 Sep 01, without authority, fail to go at the time prescribed to your appointed place of duty. Reduction to Airman. (No appeal) (No mitigation)

(2) 18 Sep 01, Tinker AFB, OK - Article 83. You, did, at or near the Continental United States, on or about 23 Nov 99, by means of knowingly deliberate concealment of the fact that you possessed marijuana procure yourself to be enlisted as an airman in the United States Air Force, and did thereafter, at or near Tinker AFB, OK, receive pay and allowances under the enlistment so procured. Article 107. You, did, at or near the Continental United States, on or about 30 Nov 99, with intent to deceive, sign an official document, to wit: SF 86, Questionnaire For National Security Positions, which document was false in that you marked you had not been arrested for, charged with or convicted of any offense(s) related to alcohol or drugs, or any other offense(s) not listed above when in fact you had been arrested for domestic violence, possession of marijuana, and convicted of shoplifting, and was then known by you to be so false. Suspended reduction to Airman. Forty

five days extra duty, and a reprimand. (No appeal) (No mitigation)

e. Additional: None.

f. CM: None.

g. Record of SV: 26 Jan 00 - 25 Sep 01 Tinker AFB 3 (Initial)

h. Awards & Decs: AFTR, SAEMR.

i. Stmt of Sv: TMS: (2) Yrs (2) Mos (8) Das
TAMS: (2) Yrs (0) Mos (12) Das

4. BASIS ADVANCED FOR REVIEW: Appln (DD Fm 293) dtd 8 Oct 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. Copy of Personnel Records.
3. Article 15s.
4. State of Utah Expungement Documents.
5. Memorandum For Air Force Discharge Review Board.
6. USAF Training Documents.
7. Retention Memorandum From Aug-Sep 2001.
8. Five Character References.

10DEC04/ia

ISSUES

- A. That [] discharge was improper in that [] was the recipient of a constructive waiver of discharge pursuant to AFI36-3208, 5.19.3.
- B. That [] discharge was inequitable in that the grounds used for his discharge was based upon the response to one question in his enlistment paperwork and that response was given only upon the advice of his recruiting officer.
- C. That [] discharge resulted in an injustice requiring correction of his military record through his reinstatement to active duty dated to 20020206.

SUMMARY OF FACTS

[] while married to [] was arrested for domestic violence, possession of marihuana and misdemeanor retail theft. Prior to the enlistment process, [] applied for expunction of his criminal record pursuant to the laws of the State of Utah. In November 1999, he received a letter from the Utah BCI stating that he had been approved for both eligibility certificates (expungement of all charges in his criminal record), and that he should go to the Bureau of Criminal Investigation office and pay a fee to finalize the process. A clerk with the Utah BCI advised him that "from this point on, if someone was to ask if you had ever been arrested, you could tell them that you had not." [] filled out the two orders of expungement and sent them to the two country court offices involved.

[] with the desire to turn his life around, pursued enlistment into the USAF. He met with his recruiter, TSgt [] to discuss eligibility requirements and he told [] that he had had his criminal record expunged, fully revealing the

details of each of the charges/convictions. [] advised [] not to worry, that when [] filled out the forms, he, [] would tell him how to answer. I followed his instructions, processed through MEPS, and entered the USAF on 26 January 2000.

In September 2000, worried about other Airmen being discharged for fraudulent entry into military service, [] consulted with his security manager, TSgt [] about his own enlistment paperwork, telling her everything about both the nature of the offenses and the manner in which his paperwork was completed. She advised [] that they would take care of any problems arising in his security clearance. At this same time, [] was going through a divorce from [] [] and [] with the intent to ruin []'s life and career in the Air Force, sent a copy of his criminal record to his First Sergeant, MSgt [] [] explained everything to MSgt [] and his commander, Maj [] Nonjudicial punishment was offered, and, feeling that he should take accept some of the responsibility for the conditions of his enlistment, [] accepted the nonjudicial punishment (45 days extra duty and a suspended reduction in rank). Maj [] advised him that he could move on with his career and rise above the situation. Mr. [] was not processed for discharge.

While serving his extra duty punishment, [] reported 15 minutes late to work one day because his truck had broken down on the highway. He was able to temporarily repair his vehicle and report to work. As a result, the suspension of his reduction in rank was vacated and [] lost a stripe. He was not processed for discharge.

After the completion of the extra duty punishment, [] was allowed leave to visit his children. While visiting his children, his ex-wife, angry because he would not agree to reconcile, called MSgt [] to falsely report []'s behavior as assaultive. [] had already talked to MSgt [], who told him they would talk about it upon his return to the base. Mr. [] was ordered to report to the commander's office whereupon he was told that his discharge would be processed, even though his security clearance had come back clean. Mr. []'s discharge was effective 06 February 2002.

JUSTIFICATION

A. Improper discharge. In support of his position that the discharge was improper in that applicant had been the recipient of a constructive waiver of discharge pursuant to AFI36-3208, 5.19.3, applicant would show the following:

Maj [] clearly intended to retain Mr. [] in the AF after learning the facts and circumstances surrounding the purported fraudulent entry. While acknowledging that the inaccurate response given to the question on Form 86, "In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above?" was wrong, Maj [] chose to offer nonjudicial punishment. Mr. [] was given only 45 days extra service and a suspended reduction in rank. Maj [] told Mr. [] that he could "move on" with his career and "rise above" the situation. When all the facts were known to Maj [], he did not process Mr. [] for discharge. Later, when Mr. [] was delayed in reporting to duty because of his vehicle breakdown, Maj [] only vacated the suspension of the reduction in rank and

did not process Mr. [] for discharge. Maj [] told Mr [] to report back to work the next day in the proper uniform, evidencing intent to retain Mr. []. Finally, when Mr [] was processed for discharge, it was based upon the fallacious, incessant and recurring reports of a vindictive ex-wife, not on any actual misconduct by Mr. [].

B. Inequitable discharge.

In support of his position, Mr. [] would show that discharge was disproportionate to the circumstances surrounding the grounds given. AFI36-3208, 5.15 establishes that "an airman may be discharged for fraudulent entry ... through any deliberate, material misrepresentation, omission, or concealment that, if known at the time of enlistment or entry into a period of military service, might have resulted in rejection. The fraud may occur at any time in the enlistment process; for example, when airmen are asked to fill out forms." Mr. [] has been completely forthcoming in providing all details of his criminal record. He told his recruiting officer about the offenses and the expungement. His recruiting officer, TSgt [], instructed him on how to answer the pertinent questions (in the negative). Mr. [] relied upon TSgt [] in responding to the questions as the information about his criminal record was complex. Mr. [] understood his record to have been expunged and had been told by a Utah BCI clerk that he could answer no to questions asking about arrest and conviction. TSgt [] as a recruiting officer, should have had an understanding of the appropriate response to such questions in the enlistment paperwork. In a telephone conversation with TSgt [] on 4 December 2003, he accepts responsibility for advising Mr. [], but then refuses to provide a written statement. TSgt [] also failed to respond to a written

request by legal counsel for a statement. Mr. [] never intended to misrepresent or conceal his criminal record when responding to the questions in his enlistment package.

When Mr. [] became aware of other airmen being discharged for fraudulent entry, he reported his situation to security manager. TSgt. [] advised him to wait and see what came back on his security clearance. TSgt. [] asserts in her statement that she had "no reason to believe Mr. [] intentionally and with forethought planned to deceive the USAF." Only after two women, intent on destroying Mr.

[]'s life and career, reported his criminal record to MSgt. [] was Mr. [] called on to take responsibility for his responses. Even then, Maj. [] was overheard to say he believed Mr. [] and retained Mr. [] in the AF. It was only later, after recurring contact and complaints from the two malicious women that Mr. []'s discharge was processed. Both MSgt. [] and Maj. [] had spoken to the women on many previous occasions and had not seen their lies as reason to deal adversely with Mr. []. It is unjust and resulted in an inequitable discharge that they may have been tired of dealing with these women.

CONCLUSION

Mr. [] submits this Application for the Review of Discharge From the Armed Forces of the United States on the basis that his discharge was improper as he was the recipient of a constructive waiver of discharge from his commanding officer, Maj. []. Additionally, Mr. [] asserts that his discharge was inequitable as it was based upon an inaccurate statement in his enlistment paperwork, answered according to the instructions of his recruiting officer. Maj. [] clearly intended to retain [] in

the Air Force upon first learning all the facts and circumstances surrounding the enlistment. He knew about []'s expungement of criminal records, the nature of the offenses for which [] was initially arrested and convicted or of which charges were dismissed. He was aware that [] requested assistance from his recruiting officer in responding to the questions about his criminal record. Maj [] even commented to his First Sergeant that he believed that [] did not have fraudulent intent in answering the questions as he did. Because he chose not to discharge Mr. [] at this time, Mr. [] had a legitimate reason to believe that discharge had been waived.

Since revocation of the discharge and reinstatement to active duty status is not available, the proper remedy in this case is correction of Mr. []'s military record to reflect an honorable discharge and a change in the Reenlistment Code to allow Mr. [] to re-enlist into the Armed Forces, preferably the United States Air Force.

RESPECTFULLY SUMMITTED,





DEPARTMENT OF THE AIR FORCE
552d EQUIPMENT MAINTENANCE SQUADRON (ACC)
TINKER AIR FORCE BASE OKLAHOMA

FD2004-00410

22 January 2002

MEMORANDUM FOR AMN [REDACTED]

FROM: 552 EMS/CC
Tinker AFB OK 73145

SUBJECT: Notification Memorandum

1. I am recommending your discharge from the United States Air Force for Defective Enlistment. The authority for this action is AFD 36-32 and AFI 36-3208, paragraph 5.13.4, Fraudulent Entry. If my recommendation is approved, your service will be characterized as honorable or general. I am recommending that your service be characterized as general.

2. My reasons for this action are:

On or about 23 Nov 99, with intent to deceive, and by deliberate concealment of the fact that you had been arrested for, charged with or convicted of domestic violence, possession of marijuana, and convicted of shoplifting, procure yourself to be enlisted as an airman in the Air Force, and did thereafter, at or near Tinker Air Force Base OK, received pay and allowances under the enlistment so procured. You deliberately concealed the fact that you had been arrested for, charged with or convicted of possession of marijuana, domestic violence and shoplifting prior to enlistment. See Atch 1. As a result, you received an Article 15, dated 18 Sep 01. Punishment was reduction to the grade of airman (suspended until 17 Mar 02), 45 days extra duty, and a reprimand. See Atch 2. In addition, at or near Tinker AFB OK, on or about 27 Sep 01, without authority, you failed to go at the time prescribed to your place of duty, Bldg 230. As a result, you received a Record of Proceedings of Vacation of Suspended Nonjudicial Punishment. You were reduced to the grade of airman, effective 14 Nov 01. See Atch 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 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.

3. You have the right to consult counsel. Military legal counsel has been obtained to assist you. I have made arrangements for you to consult Capt [REDACTED], at Bldg 452, Tinker AFB OK on 23 January 2002, at 0800 hours. If it is necessary to change this appointment time, call Capt Reed's office at 405/739-7713. You may consult civilian counsel at your own expense.

4. You have the right to submit statements in your own behalf. Any statements you want the separation authority to consider must reach me by 25 January 2002, unless you request and receive an extension for good cause shown. I will send them to the separation authority.
5. 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.
6. You were scheduled for a medical examination on 17 January 2002, and you should have reported to the Tinker AFB Hospital, Physical Exam Section, on that date for the examination.
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 in the orderly room.
8. Execute the attached acknowledgment and return it to me immediately.



Commander, 552 EMS

Attachments:

1. AF Form 2030
2. Art 15, dtd 18 Sep 01
3. Record of Vacation of Susp Punishment
4. Acknowledgment Ltr