

AIR FORCE DISCHARGE REVIEW BOARD HEARING RECORD

(INITIAL)

TYPE GEN	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

3		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 18 May 2005	CASE NUMBER FD-2005-00033	
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APPLICANT'S ISSUE AND THE BOARD'S DECISIONAL RATIONALE ARE DISCUSSED ON THE ATTACHED AIR FORCE DISCHARGE REVIEW BOARD DECISIONAL RATIONALE

Case heard via video-teleconference between St. Augustine, Florida, and Andrews AFB, Maryland.

Advise applicant of the decision of the Board 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.

SIGNATURE OF BOARD MEMBER: _____ SIGNATURE OF BOARD PRESIDENT: _____

INDORSEMENT		DATE: 5/20/2005
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-2005-00033

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 appeared and testified before the Discharge Review Board (DRB), without counsel, via video-teleconference between Andrews AFB, Maryland, and St Augustine, Florida, on 18 May 2005.

The following additional exhibits were submitted at the hearing:

- Exhibit #5: Florida State University Transcript
- Exhibit #6: Florida Criminal History Report
- Exhibit #7: Two Tallahassee Community College Letters, 18 May 2004 and 2 February 2004
- Exhibit #8: Letter of Reference from Dr. [REDACTED]
- Exhibit #9: Two Tallahassee Community College Letters, 28 March 2003 and 19 May 2003
- Exhibit #10: Florida Air National Guard Letter, 29 November 2001
- Exhibit #11: Florida Air National Guard Letter, 11 February 2002
- Exhibit #12: Air Force Office of Special Investigations FAX, 12 September 2001
- Exhibit #13: Florida Air National Guard Letter, 28 March 2002
- Exhibit #14: FOIA/PA Response Letter, 23 August 2004
- Exhibit #15: DC2 Clearance Search Results, 18 August 2004
- Exhibit #16: Letter from Applicant, 30 November 2004, 4 pages

Following the Board, the applicant sent an additional 13 page document for the board's consideration. In order to be sure the applicant received every opportunity to present his case, the document was considered by the board members.

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

FINDINGS: Upgrade of discharge and change of reason and authority for 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.

ISSUE:

Issue 1. The applicant contends discharge was inequitable because he did not commit the misconduct alleged. Despite his assertion, two witnesses identified him as the offender and a witness provided a license plate number that matched the applicant's. His commander concluded he had committed the misconduct and initiated separation action for sexual perversion. The DRB concluded the applicant had committed the misconduct and that 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. The 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, material submitted by the applicant and his other accomplishments. They found the seriousness of the willful misconduct offset the positive aspects of the applicant's duty performance. The DRB concluded the discharge was appropriate for the reasons which were the basis for this case.

Issue 3. The applicant contends his discharge should be upgraded because of his good citizenship and post-service activities. The DRB was pleased to see that the applicant was doing well in college and has a plan for his future activities. However, no inequity or impropriety in his discharge was found in the course of the hearing. The DRB concluded the misconduct of the applicant was appropriately included in the characterization of his term of service.

Issue 4. The applicant asserted that his right against self-incrimination under the 5th Amendment to the U.S. Constitution was violated by his commander's initiation of discharge proceedings before his civilian trial. His assertion is legally incorrect. He did not incriminate himself and therefore no violation occurred.

Issue 5. The applicant alleges that he was denied an administrative discharge board, however he admitted he waived his right to a discharge board as a reserve of the Air Force and that he was not entitled to a discharge board under the relevant rules of the State of Florida Air National Guard at the time of his discharge. He requested a single discharge board be held in his case or that his AGR status not be decided until after a reserve discharge board, but his request was not granted and there was no requirement that it be granted.

Issue 6. The applicant alleges that he was discharged as a result of his reporting numerous problems with the maintenance and personnel practices in the Air National Guard. However, he testified that an IG investigation determined that no unlawful retaliation had occurred, and the DRB opines he would have been discharged for his misconduct regardless of whether he had complained about the maintenance and personnel practices.

Issue 7. The applicant complains that he had ineffective assistance of counsel because his military counsel had never represented an AGR member and was not located at the same installation. Lack of prior experience in representing a particular class of individual is not automatically disqualifying. There is no requirement that a lawyer be located at the same installation as a client. The applicant utilized civilian counsel while retaining his military counsel and so received adequate legal advice.

Issue 8. The applicant asserts that his commander committed an impropriety because the commander told OSI action would be taken under the UCMJ. The commander did not do so. There is no requirement a commander take military justice action on an allegation. Rule for Courts-Martial 306 specifically provides for administrative resolution of allegations (including discharge) when a commander deems it appropriate.

Issue 9. The applicant believes that because the civilian court system dismissed his case, he should not have been discharged because there was no conviction or action tantamount to a conviction in his case. Unfortunately for the respondent, he is confusing two different grounds for discharge. A member may be discharged for a civilian conviction or action tantamount to a conviction, but he was not discharged under that provision. Instead, he was discharged after his commander made an administrative determination that he had engaged in sexual perversion based on two witnesses who identified him as the offender and a witness who provided a license plate number that matched the applicant's.

Issue 10. The applicant alleges an impropriety occurred because he believes Article 27, UCMJ, concerning detail of trial and defense counsel, was violated in his case. Article 27 is applicable to courts-martial, not administrative discharge board proceedings. He also complains that he was denied effective assistance of counsel because his military defense counsel was collocated with, and rated by, another judge advocate who the applicant claimed was advising his commander. The Air National Guard allows assistant staff judge advocates to represent members in discharge actions, and there is no evidence that the senior judge advocate had improper involvement in the case.

Issue 11. The applicant asserts that because he was not tried for his actions in a civilian court, those actions may not be considered for the purpose of characterizing his service. Had his case resulted in judicial

proceedings resulting in an acquittal or other action having the same effect, he would have been correct. In his case however, the charges were merely dismissed which is not the same thing as an acquittal. Because there was no adjudication in his case, there is nothing to prevent his commander from considering the applicant's misconduct in determining an appropriate service characterization.

Issue 12. The applicant claims that security regulations mandate certain notification and permission procedures be followed before a member with a high security clearance is discharged. The regulations he mentions do not create any rights for a member in a discharge action, but are intended to protect against the disclosure of classified information. The board was unable to discern any impropriety which acted to the prejudice of the applicant in the alleged failure of the government to proceed under such regulations. The applicant was informed in the hearing that the video-teleconference was not a secure means for transmission of classified material and that at least one member of the board possessed only a secret clearance. The applicant was further advised that if he wished to pursue any classified aspects of his case beyond merely alleging a government failure to receive permission from security officials to proceed in his case, he should request a special secure forum to do so. The applicant also alleged irregularities in the revocation of his security clearance, but such matters are beyond the Discharge Review Board's purview and are not relevant to the discharge action.

Issue 13. The applicant contends his discharge was improper because he did not receive a veteran's benefits briefing, a transition assistance briefing or a medical examination. The board does not find that his receipt of such briefings would have changed his discharge and notes that the applicant has sought and received medical evaluation and treatment from the Veteran's Administration.

Issue 14. The applicant maintains that his commander did not comply with the requirement that all investigations "properly and completely develop, substantiate and document all facts." Contrary to the applicant's contention at the hearing, his commander was not obligated to wait for a civilian adjudication before he took action on the applicant's case. The commander received a completed AFOSI investigation prior to acting on the applicant's case.

Issue 15. The applicant complains of numerous errors in his "paperwork and subsequent DD-214." The board gave the applicant the benefit of the doubt and considered the case as if the applicant's records showed all of the awards he claims he was authorized but has no power to change the alleged errors in his paperwork.

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

(Former TSgt) (HGH TSgt)

1. **MATTER UNDER REVIEW:** Appl rec'd a GEN Disch fr ANG Jacksonville, FL on 24 Apr 02 UP AFI 36-3209, para 3.21.3.1 (Misconduct - Commission of Serious Offense - Sexual Deviation). EXAMINER'S NOTE: Two other paragraphs indicating reason for Discharge have been cited in his record. (para 3.13.2 - Unsatisfactory Participation and para 3.21.1 - Misconduct - Minor Disciplinary Infractions). Appeals for Honorable Discharge, and to Change the RE Code, Reason and Authority for Discharge.

2. **BACKGROUND:**

a. DOB: 13 Nov 67. Enlmt Age: 17 0/12. Disch Age: 34 5/12. Educ: HS DIPL. AFQT: N/A. A-67, E-67, G-58, M-76. PAFSC: 2A373A - Tactical Aircraft Maintenance Craftsman. DAS: Unknown.

b. Prior Sv: (1) AFRes 19 Nov 84 - 08 Oct 85 (10 mos 19 das) (Inactive).

2) Enlisted USAF as AB on 09 Oct 85 for 6 years. Extended on 26 Oct 90 for 09 months. Svd: 06 yrs 09 mos 0 days, all AMS. A1C-(APR indicates): 9 Oct 85 - 8 Oct 86. SrA-(APR indicates): 26 Jul 87 - 25 Jul 88. Sgt-(APR indicates): 26 Jul 88 - 16 May 89. SSgt - 12 May 91. APRs: 9,9,9,9. EPRs: 5,5,5.

3. **SERVICE UNDER REVIEW:**

a. Enlisted ANG 1 Oct 93 for 6 years. Extended 13 Jan 00 (period unreadable). Svd: 08 Yrs 06 Mo 23 Das, of which AMS is 03 Yrs 02 Mo 19 Das.

b. Grade Status: TSgt - 01 Apr 99

c. Time Lost: None.

d. Art 15's: None.

e. Additional: Civilian Police Report, 6 AUG 01 - Exposure of Sexual Organ.

Court Docket, 16 JUN 03 - Hearing date 5 Dec 01, and
Summons Issued 14 Nov 01.

f. CM: None.

g. Record of SV: 06 Feb 99 - 05 Feb 00 Homestead ARS Superior (Annual)

h. Awards & Decs: AFAM, SAEMR, AFLSA W/2 BOLC, NDSM, AFOLTR, AFOSTR, SW ASIA SVC MDL W/3 BOLC, AFGCM, AFRESM W/M, NCOPMER, AFTR, KUWAIT LIB MDL (SA), KUWAIT LIB MDL (K), AFOUA W/V & 4/BOLC, ARFMSM, AFBMT HON GRAD RBN.

i. Stmt of Sv: TMS: (16) Yrs (02) Mos (12) Das
TAMS: (09) Yrs (11) Mos (19) Das

4. **BASIS ADVANCED FOR REVIEW:** Appln (DD Fm 293) dtd 18 Jan 05.
(Change Discharge to Honorable, and Change the RE Code, Reason and Authority for Discharge.)

Issue 1: ISSUES ATTACHED TO BRIEF.

ATCH

1. Applicant's Brief.
2. Four pages of Police Reports.
3. State Attorney's Office Letter, explaining "nolle prossed".
4. Letter of support.
5. Letter to Attorney w/Discharge documents attached.
6. AFOSI Report of Investigation, 27 Aug 01.
7. NGB Form 22 - Report of Separation and Record of Service.
8. Special Order A-259, 3 Mar 02, Approving Characterization and date of Discharge.
9. Two leave forms.
10. Special Order T1-38, 23 Apr 02, Authorizing travel for separation physical.
11. Two leave forms.
12. Two copies of DD Form 214, 24 Apr 02 for Active Duty ANG.
13. Two printouts of Decoration History.
14. DD Form 214, 8 Jul 92, AF Active Duty.
15. ANG Active Duty Order, AO-72, 4 Feb 99.
16. Amendment to ANG Active Duty Order, order AO-72, 4 Feb 99.
17. Two Copies of Involuntary Separation from the AGR Program.
18. Two Requests for Records pursuant to Freedom of Information Act.
19. Copy of Certified Mail Receipts.
20. Fax Cover Sheet w/5 attachments.
21. Computer Printout of Finalization of Court Case.
22. Seven Letters of Support.
23. Copies of three Performance Reports.
24. Unofficial Student Transcript.

3Mar05/day



DEPARTMENT OF THE AIR FORCE
Detachment 1, 125TH FIGHTER WING (ACC)
29050 CORAL SEA BLVD, BOX 4
HOMESTEAD ARS, FLORIDA 33039-1299

November 27, 2001

MEMORANDUM FOR TSgt [REDACTED], Det 1, 125 FW

FROM: Det 1, 125FW/CC

SUBJECT: Notification of Discharge Recommendation

1. I am recommending your discharge from the Air National Guard of the United States and as a Reserve of the Air Force for: Misconduct. The authority for this action is AFI 36-3209, paragraph 3.21.3.1. Copies of all supporting documents are attached.
2. My reasons for this action are: During various times in 2000 and 2001, to include February 20, 2001, you indecently exposed yourself to toll booth operators at the Florida Turnpike.
3. This action may result in your receiving an Honorable, General, or Under Other Than Honorable Condition discharge. I am recommending your service be characterized as Under Other Than Honorable Conditions.
4. If you have received advanced educational assistance moneys or special pay or bonuses, you may be required to repay the U.S. for these moneys under the authority of Title 10 U.S.C., Section 2005.
5. You have the right to:
 - a. Consult legal counsel. Military legal counsel is available to assist you. You may contact Cpt. [REDACTED] at the 125th Fighter Wing Legal Office, (904) 741-7041, to make an appointment. You may consult civilian counsel at your own expense, or request military counsel of your choice if reasonably available.
 - b. Submit statements at any time prior to the decision of the Separation Authority to be considered in the disposition of this case. A request for or waiver of the board hearing does not affect your right to submit such statements or documents at any time.
 - c. Waive the above rights, as well as your right to an administrative discharge board hearing, after having the opportunity to consult with counsel.

6. A copy of AFI 36-3209 is available for your use. You may obtain a copy of this instruction from the 125 FW Information Management Office, the Military Personnel Flight (MPF), or the Base Legal Office.
7. You must execute and return, within 24 hours of your receipt of this letter, the attached Acknowledgement of Receipt of this letter and attachments.
8. You must also execute and return, within 15 days of your receipt of this letter, the attached Election of Rights electing one of the following options:
 - Request for a board hearing
 - Waiver of a board hearing.
9. If you request an administrative discharge board hearing, you must also indicate on the Election of Rights the following:
 - Whether you want to make a personal appearance
 - Whether you want representation by the military legal counsel made available to you.
 - Whether you ask to be represented by military counsel of your choice. If so, identify such counsel by name, grade, organization and phone number.
 - Whether you will be represented by civilian counsel. If so, identify such counsel by name and address.
 - Names, addresses and telephone numbers, if known, of any witnesses that you want to appear before the board, giving a summary of their expected testimony on the issue of separation or characterization, and an explanation why written or recorded testimony of the witnesses could not be presented to the board hearing for a fair determination of the case.
 - A statement that failure to appear at a scheduled administrative discharge board hearing, after you have indicated the intention to make a personal appearance at such hearing, will result in the case being heard by the administrative discharge board in your absence.
 - A statement that if you or counsel need additional time to prepare for or attend the board hearing, you or counsel may submit a written request for delay stating the reasons and how much time is needed. The legal advisor for the board hearing approves or disapproves the requests.
10. Failure to return the Acknowledgement of Receipt or the Election of Rights within 15 days after receipt of this letter constitutes a waiver of all rights, with the result that the case will be processed without an administrative board hearing on the information available.
11. You may request an extension of time to respond if additional time is needed. You (or your counsel) must submit a written request stating the reasons and amount of time needed. A request for extension of time must be received by me not later than 15 days of your receipt of this letter.

[REDACTED]

Det 1, 125FW, Commander

3 Attachments:

1. Airman's Acknowledgement
2. Privacy Act Statement
3. Airman's Election of Rights