

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

AUG 3 11998

IN THE MATTER OF:

DOCKET NUMBER: 97-01105

COUNSEL: [REDACTED]

HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

He be reinstated in the Regular Air Force in the grade of airman (E-2), which was the grade he held at the time of discharge.

APPLICANT CONTENDS THAT:

The evidence supports allegations that the discharge authority acted unwisely and was improperly biased toward discharging him. Applicant alleges that the discharge authority discharged him prematurely before completion of an investigation of three Inspector General (IG) complaints he filed and the discharge authority failed to pursue his (applicant's) allegation of ethnic discrimination. He alleges there were errors or injustices regarding: (a) ethnic discrimination, (b) defamation/intimidation, (c) denial of due process, (d) dereliction of duty, and (e) harassment.

Applicant's submission is attached at Exhibit A.

STATEMENT OF FACTS:

Applicant enlisted in the Regular Air Force on 3 October 1988 for a period of four (4) years in the grade of airman basic.

On 4 May 1990, while serving in the grade of airman, applicant's Squadron Commander notified applicant that she was recommending his discharge from the U. S. Air Force for misconduct; specifically, for minor disciplinary infractions. The Squadron Commander stated that if the recommendation was approved, she was recommending applicant's service be characterized as general. The Squadron Commander stated that her reasons for this action were: (a) On or about 18 February 1990, applicant was involved in a vehicle accident that resulted in serious physical injury and later charged with reckless imprudence, for which applicant received a Letter of Reprimand/Unfavorable Information File (LOR/UIF) on 30 April 1990. (b) On or about 12 March 1990, applicant failed to obey a lawful written order in that he

operated his privately owned vehicle (POV) while on revocation, for which he received an Article 15 on 10 April 1990. Punishment consisted of a reduction to the grade of airman, from airman first class, and 30 days extra duty. (c) On or about 29 March 1990, applicant failed to maintain AFR 35-10 standards by not shaving and received a Letter of Counseling (LOC) on 29 March 1990. (d) From on or about 19 May 1989 to mid-February 1990, applicant failed to maintain the minimum amount of liability insurance on his POV and received an LOR/UIF on 27 March 1990. (e) On or about 20 March 1990, applicant failed to maintain AFR 35-10 standards by not having a proper military hair cut, for which he received an LOC on 20 March 1990. (f) On or about 16 March 1990, applicant failed to maintain AFR 35-10 standards by not having a proper military hair cut and for changing the color of his hair to an orange tint and received an LOC on 16 March 1990. (g) On or about 26 February 1990, applicant failed to maintain AFR 35-10 standards by not having his boots shined and his uniform pressed and received an LOC on 26 February 1990. (h) On or about 18 February 1990, applicant failed to report a serious vehicle accident in which he was involved and received an LOC and revocation of driving privileges on 22 February 1990. (i) On or about 21 December 1989, applicant was negligent in the performance of his duties in that he repeatedly failed to follow proper procedures and received an LOC on 9 January 1990. (j) Applicant received a verbal counseling on 21 December 1989 for failing to obey the posted speed limit. (k) Applicant received an LOC on 11 December 1989 for failing to obey the posted speed limit on 10 December 1989. (l) Applicant received a verbal counseling (no date) in which he was cited for operating an unsafe vehicle on 4 June 1989 in that his POV's front tires had no tread.

On 4 May 1990, applicant signed the "Receipt of Notification Letter" and on 15 May 1990 indicated that he had been notified of the Squadron Commander's recommendation for discharge. Applicant did consult military legal counsel and submitted statements in his own behalf for consideration.

On 15 May 1990 the Squadron Commander forwarded the recommendation for discharge on the applicant to the Wing Commander. The Squadron Commander did not recommend probation and rehabilitation stating that she had given the applicant ample opportunity to improve his military deportment and that he has chosen not to conduct himself in a responsible manner after rehabilitative efforts.

The Headquarters  Air Force Staff Judge Advocate (SJA) reviewed the recommendation for discharge and found it to be legally sufficient. The SJA, on 30 May 1990, recommended the applicant be discharged with a general discharge without probation and rehabilitation. The Discharge Authority approved the recommended administrative discharge action on 31 May 1990.

Applicant was discharged on 14 June 1990 under the provisions of AFR 39-10 (Misconduct - Pattern Conduct Prejudicial to Good Order and Discipline) in the grade of airman with a General (Under Honorable Conditions) discharge. He served 1 year, 8 months and 12 days of active duty.

Applicant made his first application to the Air Force Discharge Review Board (AFDRB) for an upgrade of his discharge to honorable. The AFDRB denied his request on 10 September 1991. The Board noted that "there is no requirement to delay discharge processing pending completion of an IG investigation." The Board found no legal or equitable basis for an upgrade of applicant's discharge.

Applicant then applied to the Air Force Board for Correction of Military Records (AFBCMR), however, later withdrew his application on 15 February 1995 pending a decision from the AFDRB on his second application. Applicant's request for withdrawal was approved, without prejudice on 21 February 1995.

Applicant made a second application to the AFDRB again requesting upgrade of discharge to honorable. He was granted a rehearing. The AFDRB again denied applicant's request for upgrade of discharge on 20 March 1995. The AFDRB did, however, direct that the narrative section of the applicant's DD Form 214 be corrected to read "Misconduct - Minor Disciplinary Infractions" in order to reflect the correct basis for discharge.

The Joint Service Review Authority (JSRA) amended the decisional document prepared by the AFDRB on 20 March 1995 to clarify the effect, if any, of the denial of applicant's right to have his father appear to speak on the applicant's behalf during the applicant's Article 15 proceeding, on the character of the applicant's discharge. The JSRA found no evidence which would overcome the presumption of regularity and concluded that "based on the numerous letters of reprimand and counseling, the discharge (and the resulting characterization of service) would have been proper and equitable without the Article 15."

AIR FORCE EVALUATION:

The Military Personnel Management Specialist, HQ AFPC/DPPRP, states that applicant's case has been reviewed for separation processing and there are no errors or irregularities causing an injustice to the applicant. The discharge complies with directives in effect at the time of his discharge. The discharge was consistent with the procedural and substantive requirements of the discharge regulation and applicant was provided full administrative due process. They recommend the request be denied.

A copy of the Air Force evaluation is attached at Exhibit C.

The Chief, Special Activities, HQ AFPC/DPPAES, states that reenlistment eligibility (RE) code "2B" is correct. The type of discharge drove assignment of the RE code. Exhibit D.

The Chief, Reenlistment & Retraining, HQ AFPC/DPPAE, states that their records indicate the applicant would have been eligible to retrain during his 35th month of enlistment (September 1991) had he remained on active duty and, provided the commander would have selected him for reenlistment. Exhibit E.

The Chief, Inquiries/AFBCMR Section, Airman Promotion Branch, HQ AFPC/DPPPWB, states that applicant was promoted to airman and airman first class upon the completion of the required time-in-grade (TIG). He was reduced to airman on 10 April 1990 and would not have met the TIG again to be promoted to airman first class until 10 February 1991. Assuming he had been promoted back to airman first class in February 1991, he could not have met the 20 months TIG requirement to be promoted to senior airman before completion of his initial enlistment on 2 October 1992. Based on the numerous reasons that were the basis for discharge, the applicant would not have been recommended for promotion. Non-selection for reenlistment is also an automatic ineligible for promotion consideration. They do not support a promotion to any grade.

A copy of the Air Force evaluation is attached at Exhibit F.

The Senior Attorney-Advisor, HQ AFPC/JA, lists a chronology of events relevant to the applicant's request for correction of his records (see attached).

HQ AFPC/JA states that the applicable regulation for administrative separation of airmen at the time of applicant's discharge was AFR 39-10. This regulation provides that an airman may be discharged for a pattern of misconduct consisting solely of minor disciplinary infractions. During the approximately 10 months of applicant's incidents of misconduct, he had an adequate opportunity to overcome his deficiencies and failed to do so. HQ AFPC/JA strongly concurs with the discharge authority's decision to discharge the applicant, without probation and rehabilitation, because of the overwhelming amount of evidence which supports a regulatory basis for separation. In fact, they note that the applicant could, and probably should, have received an "under other than honorable conditions" discharge for his commission of a serious offense of hit-and-run and failure to report a serious accident.

Applicant cites five allegations of unfair treatment.

Ethnic Discrimination: The alleged discriminatory remark was that the Deputy Staff Judge Advocate "had been to [redacted] and the country did not show him much." The remark only comments on a substandard visit to the country of [redacted] and is not indicative

of any racial hatred toward [REDACTED] people. The evidence presented by the applicant does not prove by a preponderance of the evidence that the applicant's discharge was in any way, shape or form influenced by ethnic discrimination.

Defamation/Intimidation: Applicant claims that his unit commander lied to the discharge authority in a letter which stated that the applicant's insurance company was refusing to pay the accident claim. The applicant fails to mention that at the time the unit commander wrote the letter, the statement was true. Thus, this allegation is wholly without merit.

Denial of Rights: Applicant believes that his due process rights were violated during his Article 15 hearing when his father was not allowed to speak on his behalf during the reading of his punishment. The unit commander stated that while the applicant's father was allowed to participate in previous meetings with the first sergeant, his father became a disruptive influence, and the commander was informed by the legal office that he "had no legal obligation to let applicant's father sit in on **this** portion of the reading of the Article 15." The fact that at the punishment stage of the Article 15, there was no need for representation of the applicant. The commander noted that applicant "was afforded the opportunity to have his supervisor present during the reading of the recommended punishment portion of the Article 15." HQ AFPC/JA concurs with the **JSRA** findings that this issue is without merit.

Dereliction of Duty: First, the applicant claims the base Inspector General (IG) was derelict in his duties when he improperly refused to hear applicant's complaint on an occasion when the applicant failed to disclose the subject matter of his complaint. It was reasonable for the IG to assume, after receiving no additional information from the applicant, that the basis for the complaint was the Article 15 appeal. Thus, the IG was correct in informing the applicant that the administration of nonjudicial punishment is beyond the purview of the IG. Second, applicant claims the wing commander was derelict in his duties because he approved the discharge before the completion of an IG investigation and Action Line complaint. While it may have been more appropriate to await the outcomes of these complaints, neither report would have helped the applicant or changed the outcome of his discharge because both reports correctly found applicant's complaints were without merit. They also agree with the AFDRB's conclusion that there is no requirement to delay discharge processing pending completion of an IG investigation.

Harassment: Applicant believes he is the victim of harassment resulting from what he deems as "trivial" dress and appearance violations during a two-week period. He submits no evidence to show that he did, in fact, meet AFR 35-10 standards of dress and personal appearance on the four occasions for which he received letters of counseling.

In the absence of evidence to the contrary, military administrators are presumed to act correctly, lawfully, and in good faith in carrying out their official duties. Applicant's allegations of bad faith fall far short of establishing evidence of some specific intent to injure the applicant, and federal courts require such proof in the record to overcome the presumption of regularity of the proceedings.

AFPC/JA recommends the applicant's request for reinstatement be denied. They also concur with the JSRA and the AFDRB decisions to deny the request for upgrade of discharge from general to honorable. They find no evidence of error or injustice and, in their opinion, applicant has failed to sustain his burden of establishing an error or injustice.

A complete copy of the Air Force evaluation is attached at Exhibit G.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Copies of the Air Force evaluations were forwarded to the applicant on 28 July 1997 for review and response within 30 days. Applicant obtained counsel who submits a letter, with attachments, in support of applicant's appeal.

Counsel states that in view of the various opinions which have been issued on the arguments for reinstatement, applicant now asks the AFBCMR to reinstate him at the rank of airman (E-2), the rank he held when discharged. Counsel asks the Board to consider applicant's record prior to the automobile accident. Applicant's problems really began with the accident which occurred on 18 February 1990. He was in a dangerous area where U. S. servicemen had been attacked in public. There is no question that applicant made a mistake in not immediately reporting the accident. However, he also states that he did not get a chance to report it once he reached the base, as the authorities were already there looking for him.

Counsel submits a copy of a "Complaint of Decision" to the Joint Service Review Agency (JSRA), dated 13 May 1993, which was submitted by the applicant's attorney for the AFDRB hearing.

A copy of the counsel's response, with attachments, is attached at Exhibit I.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.

2. The application was timely filed.

3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After a thorough review of the evidence of record and applicant's submission, we are not persuaded that he should be reinstated into the Air Force in the grade of airman, the grade he held at the time of discharge. His contentions are duly noted; however, we do not find these assertions, in and by themselves, sufficiently persuasive to override the rationale provided by the Air Force and the Air Force Discharge Review Board (AFDRB). The comments of the Office of the Judge Advocate General are supported by the evidence of record and also, the facts and opinions stated in the AFDRB Brief appear to be based on the evidence of record and have not been adequately rebutted by applicant. We therefore agree with the recommendations of the Air Force and the AFDRB and adopt the rationale expressed as the basis for our decision that the applicant has failed to sustain his burden that he has suffered either an error or an injustice. Therefore, we find no compelling basis to recommend granting the relief sought.

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 23 July 1998, under the provisions of AFI 36-2603.

Ms. Martha Maust, Panel Chair
Mr. Robert W. Zook, Member
Mr. Kenneth L. Reinertson, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 25 Mar 97, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, HQ AFPC/DPPRP, dated 1 May 97.
- Exhibit D. Letter, HQ AFPC/DPPAES, dated 6 May 97.
- Exhibit E. Letter, HQ AFPC/DPPAE, dated 12 May 97.
- Exhibit F. Letter, HQ AFPC/DPPPWB, dated 14 May 97, w/atc.
- Exhibit G. Letter, HQ AFPC/JA, dated 16 Jul 97.
- Exhibit H. Letter, AFBCMR, dated 28 Jul 97.
- Exhibit I. Counsel's Letter, dated 15 Oct 97, w/atchs.


MARTHA MAUST
Panel Chair