

JUL 21 1998

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 97-03137

COUNSEL: NONE

HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

1. The Enlisted Performance Reports (EPRs) rendered for the periods 14 October 1987 through 8 March 1988 and 9 March 1988 through 20 April 1989 be declared void.
2. The punishment imposed upon him under Article 15, Uniform Code of Military Justice (UCMJ), dated 23 August 1989, be set aside and removed from his record.
3. His former grade of sergeant (E-4) be reinstated.
4. His discharge be upgraded to honorable.

APPLICANT CONTENDS THAT:

1. Two different supervisors were out to ruin his reputation and get rid of him. He alleges he turned in one of his indorsers from the 1988 EPR who purportedly had a drug problem. He was subsequently moved to another work area. He identified a problem within the work area and allegedly confronted supervisors about falsifying SAC forms. As a result, he was rendered two devastating EPRs, which he believes were written in retaliation against him.
2. The incident whereby he failed to establish procedures on or about 27 May 1987 and drained hydraulic fluid while pressure was still on the fluid, happened more than one year prior to the discharge package being initiated, and therefore, should not have been included in the discharge package. He also states that there was no basis for the adverse actions taken.

In support of the appeal, applicant submits a personal statement and several other documents.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

On 24 July 1989, the applicant was notified of his commander's intent to impose nonjudicial punishment upon him for: (1) failing to go to his appointed place of duty, the LOX service plant, and (2) for being derelict in the performance of his duties on 15 July 1989, by failing to service the LOX carts.

On 8 August 1989, after consulting with counsel, applicant waived his right to a trial by court-martial, requested a personal appearance and submitted a written presentation.

On 9 August 1989, the commander determined the applicant had committed one or more of the offenses cited and imposed the following punishment: reduction to the grade of airman first class.

Applicant did appeal the punishment; and on 21 August 1989, the appeal was denied. The Article 15 was filed in his Unfavorable Information File (UIF).

On 25 August 1989, the applicant was notified by his commander that involuntary discharge action had been initiated against him for misconduct, minor disciplinary infractions. The applicant was also advised that he had a right to consult legal counsel and to submit written statements in his own behalf. He offered a waiver of his rights to an administrative discharge board conditioned upon his receipt of no less than a general discharge. On 7 November 1989, the discharge authority reviewed the case and approved the discharge for misconduct, directing the applicant be issued a general discharge without probation and rehabilitation.

The applicant, while serving in the grade of airman first class, was discharged from the Air Force on 14 November 1989 under the provisions of AFR 39-10 (Misconduct-Pattern of Minor Disciplinary Infractions) with a general (under honorable conditions) discharge. He served 4 years 7 months and 26 days total active service.

The applicant previously submitted an application to the Air Force Board for Correction of Military Records (AFBCMR) requesting his Airman Performance Report (APR), closing 8 March 1988, be removed from his records. His application was denied by the Board on 26 November 1991. On 29 January 1992, applicant was advised of the Board's decision. A complete copy of the Record of Proceeding is attached at Exhibit C.

APR/EPR profile since 1984 reflects the following:

<u>PERIOD ENDING</u>	<u>EVALUATION OF POTENTIAL</u>
3 Apr 84	8
3 Apr 85	9
16 Feb 86	9

13 Oct 86	9
13 Oct 87	8
*8 Mar 88	7
*20 Apr 89	6

*Contested reports.

AIR FORCE EVALUATION:

The Associate Chief, Military Justice Division, AFLSA/JAJM, reviewed this application and states that although the applicant endeavored in good faith to rectify the problem created by his having fallen asleep, he was nonetheless responsible for returning to his duty station at 1500 hours to attend to the remaining carts. As a result of his failure to do so, the KC-135 Production Supervisor wound up being behind schedule by 2 ½ hours on 16 June 1989. They state that, based on the information available, the applicant's nonjudicial punishment action was properly accomplished. Based on the evidence provided, they recommend denial of applicant's request.

A complete copy of the evaluation is attached at Exhibit C.

The Chief, Inquiries/AFBCMR Section, AFPC/DPPPWB, reviewed this application and states that the applicant was administered an Article 15 on 9 Aug 89. His punishment consisted of a reduction from the grade of sergeant to airman first class (A1C) with a date of rank and effective date of 9 Aug 89. They also state that removal of the two APRs would have no impact on any previous promotion consideration as the applicant was discharged 14 Nov 89. Therefore, they defer to the recommendation of AFLSA/JAJM.

A complete copy of their evaluation is attached at Exhibit D.

The Chief, BCMR and SSB Section, AFPC/DPPPAB, reviewed the application and states that although the applicant contends he did not discover the error in the report closing 8 Mar 88, until 11 Aug 95, they do not agree. They note the applicant appealed to the AFBCMR for removal of the contested report in 1991 which was subsequently denied by AFBCMR. In regards to the contested report closing 20 Apr 89, they state that the applicant has failed to provide any information or support from the rating chain. Also, in the absence of information from evaluators, official substantiation of error or injustice from the Inspector General (IG) or Social Actions is appropriate. The contested EPRs were rendered to the applicant as a result of substantiated unacceptable duty performance, established by two different evaluators in two separate work centers. They state that apparently, the applicant made excuses for his behavior then, and is still convinced he did nothing wrong during either contested reporting period. They state that, although the applicant claims they (the evaluators) were out to ruin his reputation, they have

no evidence (such as a social actions investigation or an IG complaint) of a personality conflict. It appears both of his supervisors were unable to trust him to complete any task without supervision. They mention that, had the EPR rendered to the applicant in 1988 had it's desired effect, perhaps the applicant wouldn't have overslept and caused the tanker mission to be delayed two and one-half hours. His supervisors obviously considered him incapable of accepting future challenges, and rendered the 1989 report to accurately reflect his slothful attitude and character. They therefore contend the applicant's refusal to elevate his performance to an acceptable level ultimately resulted in his administrative discharge from the Air Force. Therefore, they recommend denial of applicant's request.

A complete copy of their evaluation is attached at Exhibit E.

The Military Personnel Management Specialist, AFPC/DPPRS, reviewed the application and states that 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. They state, the incident the applicant claims should not have been considered because the incident happened over a year before the case was initiated was appropriately considered in the discharge case. The records indicate applicant's military service was reviewed and appropriate action was taken. Therefore, they recommend denial of applicant's request.

A complete copy of their evaluation is attached at Exhibit F.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Copies of the Air Force evaluations were forwarded to applicant on 9 Feb 98 for review and response within 30 days. As of this date, no response has been received by this office.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was not timely filed; however, it is in the interest of justice to excuse the failure to timely file.
3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After reviewing the evidence of record, we are not persuaded that the applicant's records are either in error or that he has been the victim of an injustice. Applicant's contentions, in our opinion, have been adequately addressed by the appropriate Air Force offices. In the absence of evidence to the contrary, we are in

agreement with the opinions and recommendations of the Air Force and adopt their rationale as the basis for our conclusion. In view of the above determination, we find no basis upon which to recommend favorable action on this application.

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 10 June 1998, under the provisions of AFI 36-2603:

Ms. Martha Maust, Panel Chair
 Mr. Michael P. Higgins, Member
 Mr. Gregory H. Petkoff, Member
 Ms. Phyllis L. Spence, Examiner (without vote)

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 13 Oct 97, w/atchs.
 Exhibit B. Applicant's Master Personnel Records.
 Exhibit C. Letter, AFLSA/JAJM, dated 26 Nov 97.
 Exhibit D. Letter, AFPC/DPPPWB, dated 16 Dec 97.
 Exhibit E. Letter, AFPC/DPPPAB, dated 14 Jan 98.
 Exhibit F. Letter, AFPC/DPPRS, dated 27 Jan 98.
 Exhibit G. Letter, AFBCMR, dated 9 Feb 98.


 MARTHA MAUST'
 Panel Chair



DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL SERVICES AGENCY (AFLSA)

26 NOV 1997

MEMORANDUM FOR AFBCMR

FROM: **AFLSNJAJM** (Major Petrow)
112 Luke Avenue, Room 343
Bolling Air Force Base, DC 20332-8000

UBJEC Correction of Military Records of [REDACTED]

Applicant's request: In an application dated 13 Oct 1997, the applicant requests that nonjudicial punishment, which he received in August 1989, be set aside. The application **was** not submitted within the three-year limitation provided by 10 U.S.C. 1552(b). Although the applicant indicates a date of discovery of 11 Aug 95, he does not explain the late discovery nor does he offer a reason for the untimely filing.

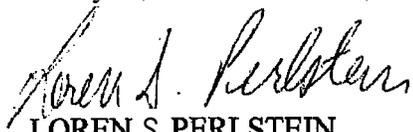
Facts of military justice action: On 24 Jul 89, the applicant (then Sergeant) **was** notified of his commander's intent to impose nonjudicial punishment upon him for: (1) failing to **go** to his appointed place of duty, i.e., the **LOX** service plant, at the time prescribed, on 15 Jul 89, in violation of Article 86, **UCMJ**; and, (2) for being derelict in the performance of his duties on 15 Jul 89, by failing to service **the** LOX carts. On 8 Aug 89, the applicant acknowledged **that** he understood **his** rights concerning nonjudicial punishment proceedings, that he had consulted a lawyer, that he waived his right to be tried by court-martial, and that he desired **to make** a personal and written presentation to the commander. On 9 Aug 89, the applicant's commander determined that the applicant had committed one or more of the offenses cited **and** imposed punishment consisting of a reduction **to** Airman First **Class**. The applicant appealed, and **his** appeal was denied on 21 Aug 89.

Applicant's contentions: The applicant asserts that on Friday, 14 June 1989, he made arrangements to get LOX carts serviced the following morning at 0800 hours. The **next** day, he attended to two of the **carts** as scheduled. Nothing else needed to be serviced at that time. He informed his supervisor that he **was** going home for lunch and would return at 1500 hours to continue servicing the carts which he had scheduled for 1600 hours. After arriving at home, he fell asleep, waking up too late **to** make the 1600 hours servicing appointment. He decided to attend to the servicing early on Sunday morning. The following day, he arrived early **and** had the **carts** prepared for servicing **by** 0800 hours. However, he was then **informed** that the service station would not be open until 1000 hours and was unable to get the carts serviced until then.

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Discussion: Although the applicant endeavored in good faith to rectify the problem created by **his** having fallen asleep, he was nonetheless responsible for returning to his duty station at **1500** hours to attend to **the remaining carts**. As a result of **his** failure to do **so**, the **RC-135** Production Supervisor, [REDACTED] wound up being behind schedule by 2 1/2 hours on 16 Jun 89. **Accordingly, based on the information available, the applicant's nonjudicial punishment action was properly accomplished and he was afforded all the rights granted by statute.**

Recommendation: After a review of the available records, I conclude **there** are no legal errors requiring corrective action regarding **the** nonjudicial punishment and administrative relief by this office is not possible. I recommend that Board deny **the** applicant's request on either its being untimely or, in the alternative, on its merits.



LOREN S. PERLSTEIN

Associate Chief, Military Justice Division
Air Force Legal **Services** Agency

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DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE PERSONNEL CENTER
RANDOLPH AIR FORCE BASE TEXAS

18 DEC 1997

MEMORANDUM FOR AFPC/DPPPAB
AFBCMR
IN TURN

FROM: HQ AFPC/DPPPWB
550 C Street West, Ste 09
Randolph AFB TX 78150-4711

SUBJECT: Application for Correction of Military Records [REDACTED]

Requested Action. The applicant is requesting the AFBCMR void his Enlisted Performance Reports (EPRs) closing 8 Mar 88 and 20 Apr 89 and his former grade of sergeant (E-4) be reinstated. He was demoted as a result of An Article 15 UCMJ received 9 Aug 89.

Reason for Request. Applicant claims there was no basis for the adverse actions taken.

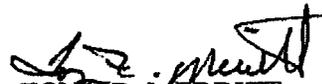
Facts. See Hq AFPC/DPPPAB Memorandum and AFLSNJAJM Memo, 26 Nov 97.

Discussion.

a. The applicant was administered an Article 15 on 9 Aug 89. His punishment consisted of a reduction from the grade of sergeant to A1C with a date of rank and effective date of 9 Aug 89. AFLSNJAJM has reviewed this case and determined that there are no legal errors requiring corrective action and has recommended denial of the applicant's request. We defer to their recommendation. However, should the AFBCMR grant the applicant's request his DOR and effective date to sergeant prior to the reduction was 4 Oct 85.

b. As a matter of information, removal of the two Airman Performance Reports (APRs) would have no impact on any previous promotion consideration as the applicant was discharged 14 Nov 89.

Recommendation. We defer to the recommendations of Hq AFPC/DPPPAB and AFLSNJAJM.


TONY R. MERRITT
Chief, Inquiries/AFBCMR Section
Enlisted Promotion Branch

[REDACTED]

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DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE PERSONNEL CENTER
RANDOLPH AIR FORCE BASE TEXAS

14 JAN 1998

MEMORANDUM FOR AFBCMR

FROM: HQ AFPC/DPPPAB
550 C Street West, Suite 8
Randolph AFB TX 78150-4710

SUBJECT: A [REDACTED] [REDACTED]

Requested Action. Applicant requests voidance of the enlisted performance reports (EPRs) that closed out 8 Mar 88 and 20 Apr 89; removal of two alcohol related incidents; and withdrawal of the Article 15 dated 9 Aug 89 from his service records. We will address only the EPRs.

Basis for Request. The applicant contends two different supervisors were out to ruin his reputation and get rid of him. He alleges he turned in one of his indorsers from the 1988 EPR who purportedly had a drug problem. He was subsequently moved to another work area. He identified a problem within the work area and allegedly confronted supervisors about "falsifying SAC Forms." As a result, he was rendered two devastating EPRs, which he believes were written in retaliation against him.

Recommendation. Time bar. If the AFBCMR considers, we recommend denial due to lack of merit. The applicant separated from active duty 14 Nov 89.

Facts and Comments.

- a. Application is not timely. Although he lists a date of discovery, 11 Aug 95, he does not give an explanation for the late discovery or explain why he was unable to file within the three years allowed.
- b. The governing directive is AFR 39-62, Noncommissioned Officer and Airman Performance Reports, 28 Oct 83, and Enlisted Evaluation System, 1 May 89, editions.
- c. In support of his appeal, the applicant submits a personal brief and extraneous material.
- d. We concur with the advisory opinions from HQ AFPC/DPPPWB, 16 Dec 97, and HQ AFLSA/JAJM, 26 Nov 97.
- e. We will discuss the EPR rendered to the applicant 8 Mar 88 first. Although the applicant contends he did not discover the error until 11 Aug 95, we do not agree. We note the

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applicant appealed to the AFBCMR for removal of the contested report in 1991 which was subsequently denied by AFBCMR, docket #91-0 1226. No new evidence has been presented to warrant reconsideration of this issue.

f. Regarding the 20 Apr 89 EPR, Air Force policy is that an evaluation report is accurate as written when it becomes a matter of record. As mentioned above, in order to effectively challenge an EPR, it is necessary to hear from all the members of the rating chain— not only for support, but for clarification/explanation. The applicant has failed to provide any information/support from the rating chain on the 20 Apr 89 EPR. In the absence of information from evaluators, official substantiation of error or injustice from the Inspector General (IG) or Social Actions is appropriate, but not provided in this case. It appears the report was accomplished in direct accordance with applicable regulations.

g. The contested EPRs were rendered to the applicant as a result of substantiated unacceptable duty performance, established by two different evaluators in two separate work centers. Apparently, the applicant made excuses for his behavior then, and is still convinced he did nothing wrong during either contested reporting period. Although the applicant claims they were out to ruin his reputation, we have no evidence of a personality conflict, such as a social actions investigation, or IG complaint. We have only his unsubstantiated word. It appears both of his supervisors were unable to trust him to complete any task without supervision. Had the EPR rendered to the applicant in 1988 had it's desired effect, perhaps the applicant wouldn't have "overslept" and caused the tanker mission to be delayed two and one-half hours. His supervisors obviously considered him incapable of accepting future challenges, and rendered the 1989 report to accurately reflect his slothful attitude and character. We therefore contend the applicant's refusal to elevate his performance to an acceptable level ultimately resulted in his administrative discharge from the Air Force. It is obvious the contested EPRs had their desired effect on the individual's subsequent work performance, as evidenced by the favorable comments from his civilian employers.

i. The burden of proof is on the applicant. He has failed to substantiate his contention the contested reports were not rendered in good faith by all of the evaluators.

Summary. Based on evidence provided, our recommendation of denial is appropriate.


Joyce E. Hogan

JOYCE E. HOGAN

Chief, BCMR and SSB Section
Directorate of Pers Program Mgt

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DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE PERSONNEL CENTER
RANDOLPH AIR FORCE BASE TEXAS

JAN 27 1998

MEMORANDUM FOR AFBCMR

FROM: HQ AFPC/DPPRS
550 C Street West Ste 11
Randolph AFB TX 78150-4713

SUBJECT: Application for Correction of Military Records [REDACTED]

The applicant, while serving in the grade of airman first class, was discharged from the Air Force 14 Nov 89 under the provisions of AFR 39-10 (Misconduct-Pattern of Minor Disciplinary Infractions) with a general (under honorable conditions) discharge. He served 04 years 07 months and 26 days total active service.

Requested Action. The applicant is requesting an upgrade of his discharge to honorable. His case was reviewed by the AFDRB and denied in Oct 96 and we concur with the finding and recommendations of the board.

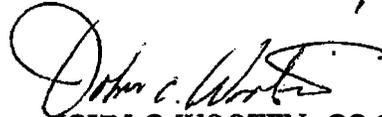
Basis for Request. Applicant claims the incident whereby he failed to establish procedures on or about 27 May 87 and drained hydraulic fluid while pressure was still on the fluid, happened more than one year prior to the discharge package being initiated, and therefore, should not have been included in the discharge package.

Facts: On 25 Aug 89, applicant was notified by his commander that involuntary discharge action had been initiated against him for misconduct, minor disciplinary infractions. The commander indicated his reasons for his action were that the applicant had infractions whereby he had a failure to go, failure to accomplish assigned task on 21, 23, and 24 Mar 89, failed to follow established procedures before loading aircraft equipment, failed to demonstrate the skills associated with his position as an NCO, by not communicating effectively with his subordinates, and finally, failed to follow established procedures on 27 May 87 when he drained hydraulic fluid while air pressure was still on the fluid. The applicant was advised that he had a right to consult legal counsel and to submit written statements in his own behalf. Applicant offered a waiver of his rights to an administrative discharge board conditioned upon his receipt of no less than a general discharge. On 7 Nov 89, the discharge authority reviewed the case and approved the discharge for misconduct, directing the applicant be issued a general discharge without probation and rehabilitation.

Discussion. This 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 incident the applicant claims should not have been considered because the incident happened over a year before the case was initiated was appropriately considered in the discharge case. The records indicate member's military service was reviewed and appropriate action was taken.

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Recommendation. Applicant did not identify any specific errors in the discharge processing nor provide facts which warrant an upgrade of the discharge he received. Accordingly, we recommend applicant's request be denied. He has not filed a timely request.



**JOHN C. WOOTEN, GS-9
Military Personnel Mgmt Spec
Separations Branch
Dir of Personnel Program Management**

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