

JUL 24 1993

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 95-02957

COUNSEL:

HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

1. He be reinstated into the Texas Air National Guard.
2. He be reinstated to the grade of technical sergeant (E-6) with back pay and allowances from the date of separation to the date of reinstatement.
3. He receive credit for the time served from the date of separation to the date of reinstatement for pay, promotion and retirement purposes.

APPLICANT CONTENDS THAT:

The contracting office (for funds to repair a mock-up of an F-4 fighter) did not challenge the contract awarded to the civilian maintenance shop which made the repairs to the display model. He (applicant) never misled any recruits into believing that they would be receiving a bonus for which they were not entitled. The allegations of a female recruit of applicant's unprofessional behavior represent nothing more than a slanderous attack upon his creditability. Also, he submitted his leave form pursuant to applicable regulations.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

Applicant enlisted in the Regular Air Force on 1 June 1983 for a period of four years in the grade of airman basic. He was subsequently honorably released from active duty on 31 July 1986 under the provisions of AFR 39-10 (Separated to the Air National Guard) and transferred to the Air Force Reserve in the grade of senior airman (E-4). He served 3 years, and 2 months of active duty.

Applicant enlisted in the Texas Air National Guard on 1 August 1986 in the grade of senior airman (E-4). He entered active duty

on 3 June 1990 as a technician in the Active Guard/Reserve (AGR) Program for a military duty tour.

In a letter, dated 18 February 1994, applicant's Group Commander submitted a Recommendation for Involuntary Separation upon the applicant. The commander stated he was recommending applicant's release from the position of Recruiter based on his (applicant's) recent involvement in the repair of government property and moral and professional dereliction as a recruiter. Specifically, he withheld information vital to the expenditure of government funds and he (applicant) conducted himself in an unprofessional manner in dealing with two recruits of this organization. Applicant was given five (5) working days to reply in writing to the separation recommendation.

Applicant was subsequently honorably released from active duty on 14 July 1994 under the provisions of ANGI 36-101 (Termination of AGR Military Duty Tour) and transferred to the ANG, State of Texas, in the grade of technical sergeant (E-6). He served 4 years, 1 month and 12 days of active duty.

On 12 July 1994, applicant's Group Commander recommended applicant's involuntary discharge from the Air National Guard and as a Reserve of the Air Force, for a pattern of misconduct according to ANGR 39-10. The commander stated that his reasons were: (a) Knowing and willful falsification of records to include a cover-up, concealment, misrepresentation, and omission of material facts from both written and oral statements and documents involving the expenditure of government funds and misuse of government property; and, (b) Inappropriate conduct unbecoming of a recruiter and non-commissioned officer. The Group Commander recommended that applicant receive a discharge Under Other Than Honorable Conditions. The Adjutant General (TAG) of Texas is the discharge authority for this action. Applicant was afforded his rights to submit written statements in his behalf, present his case to an Administrative Discharge Board, consult with legal counsel before waiving any rights. Legal counsel was obtained to assist the applicant. Applicant was informed to sign his acknowledgment receipt and of a conditional or unconditional waiver. The Group Commander indicated that applicant failed to receipt for the involuntary discharge recommendation correspondence.

There is no documentation submitted; however, the Texas ANG indicated that applicant's dismissal from the AGR position, and subsequent discharge from the Texas Air National Guard was fully substantiated by an Administrative Discharge Board Hearing. They state that applicant was released eleven months early from his AGR tour based on the inappropriate conduct. He was separated from the Texas Air National Guard with a general under honorable conditions discharge for misconduct, following the completion of the Administrative Discharge Board proceedings.

Applicant received a General discharge from the Air National Guard of Texas and as a Reserve of the Air Force on 26 January 1995 under the provisions of AFI 36-3209 (Misconduct), in the grade of technical sergeant. He served 8 years 5 months and 26 days of active duty with 12 years 4 months and 18 days total service for pay.

Available documentation is attached at Exhibit B.

AIR FORCE EVALUATION:

The Chief, Utilization, ANG/MPPU, states that the Group Commander's Memorandum, dated 12 July 1994, fully explains the charges of inappropriate conduct of the applicant while assigned to recruiting duty. Charges of this nature are considered to be inconsistent with the strict personal conduct required of a Non-commissioned Officer, especially a recruiter, in the Texas Air National Guard. Applicant was released eleven months early from his AGR tour based on the inappropriate conduct. He was discharged from the Texas Air National Guard with a General discharge, for misconduct, following the completion of the Administrative Discharge Board proceedings. ANG/MPPU believes that applicant's request is not valid and should be denied.

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

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Applicant's counsel states, in part, that the ANG/MPPU advisory opinion, dated 25 June 1996, failed to address the effect of the prior honorable discharge on the subsequent Administrative Discharge Board and subsequent general discharge, both of which involved the same command. Counsel asserts that a member cannot be administratively separated for conduct allegedly occurring during a time period for which the service member has already been discharged and has received an honorable characterization of service.

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

ADDITIONAL AIR FORCE EVALUATION:

The Chief, Utilization, ANG/MPPU, states that the AFBCMR may not order the reinstatement of a member into an AGR position in a State Air National Guard Unit. That power is reserved exclusively for the TAG who is the final authority for determining whether individuals in the AGR program will be separated or retained. The Texas TAG concurred with the

recommendations of the commanding officer to process applicant for involuntary separation based on the evidence of misconduct. Termination from the AGR program is strictly a state matter, governed by the provisions of Air National Guard Regulation 35-03. The record shows that the state complied with the applicable policies and procedures in the regulation when it processed applicant for involuntary separation. The state informed applicant of the proposed recommendation to the TAG and gave the applicant the requisite opportunity to respond and rebut the allegations contained in the recommendation. His separation was consistent with ANG regulations.

On 18 February 1994, the Group Commander recommended applicant be separated from his AGR tour as a recruiter due to misconduct. The evidence shows applicant wrongfully concealing information regarding a contract for equipment repairs. When confronted with evidence that a close family member was the contractor (applicant's father), he denied or concealed information from his superiors and unit contracting officials. Applicant committed further acts of misconduct with two Texas ANG recruits. He wrongfully misled one recruit into believing he would receive an enlistment bonus. The recruit was not eligible for the bonus and had to be released from his enlistment contract due to applicant's misconduct. Applicant had an unprofessional sexual relationship with a female recruit. Further, applicant failed to properly be approved for leave and did not report for work. He received an honorable separation from his recruiter AGR tour and was returned to the Texas ANG.

Counsel misstates the facts of this case when he asserts the same basis (misconduct) was used for the separation action and the discharge. The Group Commander's memorandum clearly sets forth the reasons for the discharge. The memorandum alleges further acts of misconduct that occurred after applicant was recommended for separation from his AGR tour. Applicant wrongfully used a government vehicle to travel 2,100 miles and used 173 gallons of gas when the official travel distance was only 750 miles. He wrongfully used excessive alcohol which resulted in an auto accident on or about 12 May 1994. ANG/MPPU believes these are legally sufficient reasons for discharging applicant under ANGR 39-10. According to paragraph 20 [ANGR para. 1-61 of that regulation, after determining a sufficient basis for discharge in the present term of enlistment, applicant's whole military record could be considered in determining the proper characterization of discharge. Based upon his whole record, a general under honorable conditions discharge could legally be granted. Applicant was provided the opportunity to contest the discharge action and characterization of discharge by presenting his case to an Administrative Discharge Board hearing. They believe there was sufficient basis for the general discharge by the Administrative Discharge Board.

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

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

In response to the additional Air Force evaluation, counsel states that the applicant's claim is that after serving a specific period of time, he was separated from the service with a discharge characterized as honorable for that specific period of time and for his earlier service. He was then subsequently separated from the service with a general characterization for the same period of time after having already received the honorable characterization for that same period of time. The advisory opinion states that two different characterizations of separation for the same period of time were not wrongful, but the advisory opinion fails to provide any authority for giving two types of characterizations for the same period of time. Absent such authority, applicant's claim for relief should be granted for such an error or injustice.

A copy of applicant's response is attached at Exhibit H.

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 Texas Air National Guard in the grade of technical sergeant; receive back pay and allowances from the date of separation to the date of reinstatement; or, upon reinstatement, that he receive credit for the time served for promotion and retirement purposes. Applicant's counsel also states that the relief requested includes reinstatement into active federal reserve status with the Air National Guard as an E-6 and withdrawal of the General under honorable conditions discharge with the Texas Air National Guard to show that he is eligible for reinstatement into the Texas Air National Guard. At the outset, it should be noted that this Board does not have statutory authority to reinstate an individual into an Air National Guard position. Applicant's and counsel's 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. Counsel for the applicant states that the advisory opinion failed to address the effect of the prior honorable

discharge on the subsequent Administrative Discharge Board and subsequent general discharge, both **of** which involved the same command. It should be noted that applicant enlisted in the Texas Air National Guard in 1986 and was subsequently ordered to active duty on 3 June 1990 in the Active Guard/Reserve (AGR) program. When he was terminated from his AGR active duty tour on 14 July 1994, it was a "Release From Active Duty" under the provisions of ANGI 36-101 with an honorable characterization of service. At that point, applicant remained in the Air National Guard and as a Reserve of the Air Force. When the applicant was subsequently separated on 26 January 1995, he was "discharged" from the Texas Air National Guard and as a Reserve **of** the Air Force under the provisions of ANGI 36-3209. As stated by the Chief, Utilization, ANG/MPPU, according to paragraph 20 [para 1-61 of Air National Guard Regulation 39-10 (ANGR 39-10), after determining a sufficient basis for discharge in the present term of enlistment, applicant's whole military record could be considered in determining the proper characterization **of** discharge. Based upon his whole record, a General Under Honorable Conditions discharge could legally be granted. We therefore agree with the recommendations **of** the Air Force 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.

4. The documentation provided with this case was sufficient to give the Board a clear understanding of the issues involved and a personal appearance, with or without counsel, would not have materially added to that understanding. Therefore, the request for a hearing is not favorably considered.

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 12 May 1998, under the provisions of AFI 36-2603.

Mr. Thomas S. Markiewicz, Panel Chair
Mr. Richard A. Peterson, Member
Mr. Loren S. Perlstein, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 1 Sep 95, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, ANG/MPPU, dated 25 Jun 96.
- Exhibit D. Letter, AFBCMR, dated 15 Jul 96.
- Exhibit E. Counsel's Letter, dated 26 Feb 97.
- Exhibit F. Letter, ANG/MPPU, dated 2 Dec 97.
- Exhibit G. Letter, AFBCMR, dated 5 Jan 98.
- Exhibit H. Counsel's Letter, dated 11 Feb 98.


THOMAS S. MARKIEWICZ
Panel Chair



DEPARTMENT OF THE AIR FORCE
AIR NATIONAL GUARD READINESS CENTER

MEMORANDUM FOR AFBCMR

25 JUN 1996

FROM: ANG/MPPU
3500 Fetchet Avenue
Andrews AFB, MD 20762-5157

SUBJECT: Application for Correction of Military Records [REDACTED]

The attached Application for Correction of Military Records submitted by Mr. [REDACTED] a former member of the Texas Air National Guard, is forwarded for your review and action.

[REDACTED] seeks reinstatement to the Texas Air National Guard with the rank of technical sergeant, back pay and allowances and credit for service to the date of reinstatement. [REDACTED] argues that the separation was involuntary and not justified on the basis of misconduct.

In reviewing the records concerning [REDACTED] case, we believe that the applicant's request is not valid. His dismissal from the AGR position, and subsequently from the Texas Air National Guard was fully substantiated by an Administrative Discharge Board hearing.

The 147 SUG/CC Memorandum for [REDACTED] dated 12 July 1994, Subject: Recommendation for Involuntary Discharge, fully explains the charges of inappropriate conduct while assigned to recruiting duty. Charges of this nature are considered to be inconsistent with the strict personal conduct required of a Non-Commissioned Officer, especially a recruiter, in the Texas Air National Guard.

[REDACTED] was released eleven months early from his AGR tour based on the inappropriate conduct. He was separated from the Texas Air National Guard with a General (under honorable conditions) Discharge, for misconduct, following the completion of the Administrative Discharge Board proceedings.

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[Handwritten signature]

Questions should be directed to MSgt Gowdy, ANG/MPPUR, DSN 278-7500.

FOR THE COMMANDER



NILDA E. URRUTIA, Lt Col, USAF
Chief, Utilization



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DEPARTMENT OF THE AIR FORCE
AIR NATIONAL GUARD



MEMORANDUM FOR AFBCMR

02 DEC 1997

FROM: ANG/MPPU
3500 Fetchet Avenue
Andrews AFB MD 20762-5157

SUBJECT: Application for Correction of Military Records- [REDACTED]
[REDACTED]

This is an addendum to our 25 Jun 96 advisory, per your request. This addendum is in coordination with the National Guard Bureau/JA's office.

[REDACTED] asserts through counsel that he was wrongfully separated from an AGR tour as a recruiter and that he was wrongfully discharged from the Texas Air National Guard. He asserts that he was discharged based on conduct that allegedly served as the basis for his separation from his AGR tour. [REDACTED] received an honorable separation effective 14 Jul 94 and was subsequently discharged with a general discharge on 26 Jan 95. He stated the same command was responsible for both actions and that the command knew of the alleged misconduct before the honorable separation was granted to him. [REDACTED] requests, (1) reinstatement to the rank of Technical Sergeant (E-6) with backpay and allowances from the date of separation to the date of reinstatement, (2) credit for the time served from the date of separation to the date of reinstatement for pay, (3) promotion and (4) full reinstatement into the Texas Air National Guard.

We initially note the AFBCMR lacks jurisdiction to grant [REDACTED] request for reinstatement into an AGR position.

The Board may not order the reinstatement of a member into an AGR position in a State Air National Guard unit. That power is reserved exclusively for the TAG who is the final authority for determining whether individuals in the AGR program will be separated or retained. ANGR 35-03, para. 6-1d. Here, the TAG concurred with the recommendations of the commanding officer to process [REDACTED] involuntary separation based on the evidence of misconduct. Given the fact that the TAG does not believe the allegations to be in error, it appears highly unlikely that the TAG would reinstate [REDACTED]

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Termination from the AGR program is strictly a state matter, governed by the provisions of Air National Guard Regulation 35-03. The record shows that the state complied with the applicable policies and procedures in ANGR 35-03 when it processed [REDACTED] for involuntary separation. The state informed Mr. Rothganger of the proposed recommendation to the TAG and gave [REDACTED] the requisite opportunity to respond and rebut the allegations contained in the recommendation. Therefore, his separation was consistent with ANG regulations

Even if the AFBCMR finds it has the power to grant [REDACTED] request, we recommend the request be denied. Our review does not support [REDACTED] allegation that the termination of his AGR tour and subsequent discharge from the Texas ANG were wrongful. On 18 Feb 94, the 147 ST/CC recommended [REDACTED] be separated from his AGR tour as a recruiter due to misconduct. [REDACTED] was terminated from his AGR tour for misconduct effective 14 Jul 94. The evidence shows [REDACTED] wrongfully concealing information regarding a contract for equipment repairs. When confronted with evidence that a close family member was the contractor [REDACTED] he denied or concealed information from his superiors and unit contracting officials. [REDACTED] committed further acts of misconduct with two Texas ANG recruits. He wrongfully misled one recruit into believing he would receive an enlistment bonus. The recruit was not eligible for the bonus and he had to be released from his enlistment contract due to [REDACTED] misconduct. [REDACTED] had an unprofessional sexual relationship with a female recruit. Further, [REDACTED] failed to properly be approved for leave and did not report for work. [REDACTED] received an honorable separation from his recruiter AGR tour and was returned to the Texas ANG.

Respondent's counsel misstates the facts of this case when he asserts the same basis was used for the separation action and the discharge. On 12 Jul 94, the 147 SUG/CC notified [REDACTED] that he was recommending [REDACTED] be discharged from the Texas ANG for misconduct. The commander's memorandum, a copy of which is in the file, clearly sets forth the reasons for the discharge. [REDACTED] counsel asserts the commander uses the same misconduct for which [REDACTED] was separated from his AGR tour with an honorable discharge. A reading of the 147 SUG/CC alleges further acts of misconduct that occurred after [REDACTED] was recommended for separation from his AGR tour. [REDACTED] wrongfully used a government vehicle to travel 2,100 miles and used 173 gallons of gas when the official travel distance was only 750 miles. He wrongfully used excessive alcohol which resulted in an auto accident on or about 12 May 94. We believe these are legally sufficient reasons for discharging [REDACTED] under then ANGR 39-10. According to paragraph 20 of that regulation, after determining a sufficient basis for discharge in the present term of enlistment, [REDACTED] whole military record could be considered in determining the proper characterization of discharge. Based upon his whole record,

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a. General Under Honorable Conditions discharge could legally be granted. [REDACTED]
[REDACTED] was provided the opportunity to contest the discharge action and
characterization of discharge by presenting his case to an administrative discharge
board hearing. We believe there was sufficient basis for the general discharge
granted to [REDACTED] by the administrative discharge board.

Questions should be directed to MSgt Gowdy, ANG/MPPUR, DSN 278-7500,
or E-mad: gowdyt@ang.af.mil.

FOR THE COMMANDER


NILDA E. URRUTIA, Lt Col, USAF
Chief, Utilization

[REDACTED]

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