

ADMINISTRATIVE DISCHARGE

Administrative Separation

We have reviewed the attached record of discharge board proceedings conducted pursuant to AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, paragraphs 3.13.2 and 3.21.4, based on the Respondent's unsatisfactory reserve training participation and civilian conviction. Although we find several procedural process errors, compounded by an incomplete record, we do not believe the errors arose to the level of legal prejudice to a substantial right of the Respondent. We therefore find the record legally sufficient to support discharge and characterization of service.

Facts:

Respondent pled guilty and was convicted of commission or attempted commission of a sex/lewd act upon a child under 16 in a State court on 18 June 2008. He was sentenced to ten years in state prison. Respondent also allegedly missed more than nine Unit Training Assemblies (UTA) between April 2008 and June 2008. On 21 May 2009 Respondent was notified of initiation of separation action, based on unsatisfactory participation and a civilian conviction, with a recommended service characterization of Under Other Than Honorable Conditions (UOTHC). The notification was sent to him at the Correction Institute. Respondent acknowledged receipt on 4 June 2009, and indicated that he desired to have his case heard by an administrative discharge board, to consult with military counsel, and to be represented by his assigned military legal counsel at the board hearing. He did not wish to appear at the board, or present witnesses, statements, or documents to be considered by the board. The package contains no further communication to or from the Respondent.

Respondent was entitled to a board based on both his status as a noncommissioned officer with 6 or more years of service and the recommended service characterization of UOTHC. The discharge board was convened on 17 June 2010.¹ Respondent was not present, although counsel was present. The Board found that Respondent was convicted in a civilian court, and did miss nine or more unexcused absences from UTA between April 2008 and June 2008. The Board recommended Respondent be discharged from the USAFR with a service characterization of UOTHC.

Errors and Irregularities: The following procedural errors or irregularities associated with initiation of the separation action warrant further discussion:

¹ The Notification letter advised Respondent that he was eligible for transfer to the Retired Reserve. He exercised his right to apply for transfer to the Retired Reserves on 4 June 2009. The Secretary of the Air Force disapproved the application on 22 April 2010. Per AFI 36-3209, paragraph 4.13.2.1, if such a submission is made prior to convening a board hearing, further board action is suspended until the Secretary takes action, thus explaining the year delay between Notification and convening of the board.

Bases for Discharge:

The original recommendation for discharge made by the Unit Commander, cited AFI 36-3209, paragraphs 3.21.3, Commission of a Serious Offense, and 3.21.4, Civilian conviction. The Wing Commander concurred with the recommendation for discharge on the same two bases. AFRC/A1KK's notification letter to Respondent, however, cited paragraphs 3.21.4, Civilian Conviction, and 3.13.2, Unsatisfactory Participation between April 2008 and June 2008. Although never specifically stated, the apparent reason for replacing Commission of a Serious Offense as a basis with Unsatisfactory Participation was a desire to allow for a UOTHC characterization. The Legal Advisor instructed the Board that "a discharge characterization of [a UOTHC] may be appropriate only if the conduct at issue directly affects the performance of military duties. According to AFI 36-3209, paragraph A2.2.3, missing a UTA is an example of conduct that directly affects the performance of military duties, so a UOTHC characterization is authorized for a discharge based on Unsatisfactory Participation." He did not comment specifically on whether a UOTHC characterization was authorized for discharge based on Civilian Conviction. The government Recorder did address this issue, stating to the Board that "because the [lewd misconduct] happened in the civilian community, you, technically, can't give him the UOTHC for that. But, you can give him the UOTHC for missing the UTAs, which he missed because of the conviction." We are not entirely convinced that this is an accurate interpretation of the AFI. Paragraph A2.2.3 provides a list of several actions, including missing UTA, as examples of conduct directly affecting the performance of military duty. It specifically states, however, that "examples of conduct that directly affects the performance of military duties" is not limited to the provided list. Based on the specific citation in paragraph A2.2.3.2 of missed UTAs as an example of conduct in the civilian community that directly affects the performance of military duty, the Recorder appropriately relied on the missed UTAs for authorization of a UOTHC characterization. However, he then took the additional step of stating the missed UTAs were the *only* basis before the Board on which a UOTHC could be authorized.² We must conclude then, that the Board recommended a service characterization based only on the finding that the Respondent was subject to discharge based on Unsatisfactory Participation.

We provide the above lengthy discussion as we do not believe the procedural process required for discharge under paragraph 3.13.2, Unsatisfactory Participation, was met. If it was not, then the question arises whether the Board could properly consider paragraph 3.13.2 as a basis for discharge, leaving paragraph 3.21.4, Civilian Conviction as the basis for discharge.³ We must

² As discussed above, paragraph A2.2.3 acknowledges other, unspecified civilian conduct could meet the requirement of directly affecting the performance of military duties such that a UOTHC would be authorized. In fact, the Recorder argued that when a member misses UTAs "due to the fact that [he has been] convicted of lewd acts upon a minor, then a UOTHC characterization is appropriate." In other words, the *reason* why Respondent missed UTAs informs the choice of characterization as UOTHC. We find this nearly indistinguishable from arguing that his conduct directly affected the performance of his military duties, and believe that the Recorder could have argued that a UOTHC could be based on Respondent's civilian conduct.

³ We note that the Board also found the Respondent subject to discharge based on paragraph 3.21.3, Commission of a Serious Offense, writing in this finding on their Findings and Recommendations Worksheet.

assume that the Board followed the Recorder's direction that they could only characterize the Respondent's service as UOTHC based on the missed UTAs, and not on his misconduct in the civilian community. If, then, the Board improperly considered Respondent's missed UTAs as a basis for discharge, then the Board's recommended characterization of UOTHC is not supportable.

We find two procedural errors in the processing of discharge for Unsatisfactory Participation. AFI 36-2254V1, *Reserve Personnel Participation*, paragraph 1.3.1, states that a unit member who has nine or more unexcused IDT absences in a 12-month period is considered an unsatisfactory participant and, under paragraph 1.3.3.6, can be administratively discharged. Paragraph 4.14.2 requires the commander or supervisor of an absent reservist to contact the individual, documenting such effort with Memorandum for Record or email. "Every effort must be made to make personal contact . . ." The only evidence provided to the Board regarding Respondent's missed UTAs is a Participation Report, dated 2 Dec 08,⁴ and three AF IMT 40As. There are no documents regarding efforts by the unit to contact Respondent and/or notify him of his unexcused absences.⁵ The third AF IMT 40A recording Respondent's absence from UTA in June 2008 was not signed or dated. Based on the Dec 08 Participation Report, it appears that after August 2008, Respondent was in some way removed or excused from UTA reporting due to his incarceration, as the Report shows no further absences. By the scheduled UTA in June 2008, the unit had ceased attempts to contact the Respondent as required, and did not document his absence other than an unsigned, undated AF IMT 40A. It may be that the unit has further documentation supporting the missed UTAs,⁶ but it is not in the package the Board considered. The unit's non-compliance with the requirements of AFI 36-2254V, combined with the incomplete evidence provided to the Board, is insufficient to meet the procedural requirements required.

⁴ Although Respondent was notified that the basis for his discharge for Unsatisfactory Performance was for accumulating nine or more unexcused absences from UTAs between April 2008 and June 2008, the Participation Record provided to the Board included missed UTAs from July and August as well. Although the July and August absences were clearly known when the notification was made to Respondent in May 2009, they were not included in the notification, and therefore should not have been included in evidence to the Board. The Recorder also incorrectly argued to the Board that "in 2008, between June and August, [Respondent] missed his UTA weekends and that's where the Unsatisfactory Participation part of this hearing comes from."

⁵ At our request, AFRC/JA inquired of the unit regarding efforts to contact Respondent regarding his missed UTAs. The unit noted that they were unable to speak to anyone during the first UTA, and learned from Respondent's stepson that Respondent was in jail during the second UTA. No attempt to contact Respondent was made for any subsequent missed UTAs, presumably based on the information that he was incarcerated, but the County Clerk's Office stated Respondent did not enter confinement until the day of his conviction, 18 Jun 2008. It's possible he was in some type of pre-trial confinement, but it is unclear when he would have entered pre-trial, as there is no indication in the unit records that he missed any UTAs prior to April 2008.

⁶ It is possible that the information was not provided by the unit as neither the unit nor the wing commander recommended missed UTAs as a basis for discharge.

We also note that one of the basic requirements for discharge for Unsatisfactory Performance was not met. AFI 36-3209, paragraph 3.13.2.1.1, authorizes discharge for unsatisfactory participation “when the commander concerned has determined that the individual has no potential for useful service under conditions of full mobilization.” Despite the Recorder’s statement that “the commander, in his Recommendation Letter, stated that Respondent has no potential for useful service under conditions of full mobilization,” the commander made no such finding in his Recommendation Letter. In the past we have concluded that when the commander initiates discharge under the paragraph requiring this determination (paragraph 3.13.2), the initiation itself can only be deemed as constituting the required determination of lack of potential. In this case, however, we can draw no such conclusion, as although the information regarding Respondent’s non-participation was known at the time, neither the unit commander nor the wing commander initiated discharge under paragraph 3.13.2.

The failure of Respondent’s counsel to raise the above two issues or otherwise object would normally constitute waiver of any defect. As discussed below, however, the Record of Board Proceedings is incomplete regarding the scope of representation by Respondent’s counsel. We therefore review briefly the facts regarding Respondent’s representation.

Representation by Counsel:

As discussed above, Respondent noted in response to the administrative discharge notification that he wished to exercise his right under paragraph 4.10.2 to consult with military counsel and, under paragraph 4.10.10.2, to be represented at the board by assigned military legal counsel. The notification memorandum provided Respondent with contact information for Capt H., the JAG who “has been designated to represent you in connection with this separation action.”

There is no information in the Record regarding any communication, or attempts to communicate, between Capt H., and Respondent. In fact, Capt H. states on the record that “we’ve had no contact with the Respondent,” and that he “has not been able to get in touch with the Respondent.” Capt H. told the Board members that “quite honestly, I’ve not had any discussions with the Respondent . . . [and] I’m not quite sure what he’d want to say to you.” Regarding the basis for discharge, Capt H. argued to the Board that “as far as, is there a basis, well certainly I mean, he was convicted of a sex offense and, obviously when he was sitting in pretrial confinement awaiting his trial, he did miss some of his UTAs. So certain there is no conceding – or no fighting those issues.” The record is clear that Capt H. never spoke to the Respondent regarding the Board hearing. What is unclear is whether he made any attempt to do so.

We understand that defense counsel are not authorized to go “shopping” for clients, and do not normally form attorney-client relationships until after a member first initiates contact with the defense counsel regarding representation. In this case, however, we believe the Respondent’s specific request to consult with counsel and be represented by counsel at the board qualifies as an attempt to form an attorney-client relationship, similar to a member stopping by a defense counsel office and requesting to see an attorney. At this point, the defense counsel had an obligation to attempt to contact the Respondent to discuss how best to represent him at the board hearing. We believe Capt H. met this burden. Our office contacted Capt H.’s defense paralegal,

TSgt J., who stated that he attempted to contact Respondent at least three separate times before his board. As he had no direct means by which to contact Respondent, TSgt J. called the correctional facility and left messages for Respondent to contact him, but received no response.⁷

As to Capt H.'s failure to raise the procedural issues related to the Unsatisfactory Participation basis for discharge and associated UOTHC characterization, we find that Capt H. and Respondent both believed they had an attorney-client relationship related to the board hearing, and that Capt H.'s failure to object therefore constitutes a waiver of the defects by the Respondent.

Conclusion: Although we find several procedural process errors, compounded by an incomplete record, we do not believe the errors arose to the level of legal prejudice to a substantial right of the respondent. We therefore find the record legally sufficient to support discharge and characterization of service.

OpJAGAF 2011/4 15 March 2011

⁷ We also note that Respondent was aware of how to contact Capt H., as he sent a letter to him on 12 Jun 10 asking Capt H. to request a delay of the board hearing date.