MAY 20 1998

ADDENDUM TO
RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: [redacted]

DOCKET NUMBER: 90-01947

COUNSEL: None

HEARING DESIRED: No

APPLICANT REQUESTS THAT:

EXAMINER'S NOTE: The applicant's requests are not clearly stated. It appears he believes he is entitled to the following relief.

He receive financial compensation for the many errors and inequities present in his case, the monies due him as a result of the previous correction to his records be recomputed, and, he be credited with additional service based on his inactive Reserve service for the purposes of his retired pay computation.

RESUME OF THE CASE:

The applicant is a former member of the Regular Air Force. He entered his initial enlistment in the Regular Air Force on 31 July 1972 in the grade of airman first class (E-3). He had 3 years of prior service with the Regular Army, which was terminated with an honorable discharge on 30 July 1972 in the grade of Specialist 5th Class (E-5). Following his enlistment in the Regular Air Force, the applicant continued to enlist and serve until 31 August 1990, when he was voluntarily relieved from active duty in the grade of master sergeant and retired per his request on 1 September 1990. He was credited with 21 years, 1 month and 1 day of active duty service.

On 26 June 1990, the applicant submitted a request under AFR 31-3 requesting that his records be corrected to show that his grade at enlistment in the Regular Air Force was staff sergeant (E-5), rather than airman first class (E-3), that he receive any and all supplemental considerations due as a result of the change to his enlistment grade, and he be awarded all backpay, BAQ, BAS, the difference in TDY pay, refunds for his overweight household goods shipments, and all other pay considerations. His request was considered by the Board on 28 February 1991. After reviewing all the evidence, the Board recommended his records be corrected to show he enlisted in the Regular Air Force grade of staff sergeant, that he was promoted to technical sergeant and master sergeant when first eligible (1 August 1974 vice 1 March 1982 and 1 August 1977 vice 1 March 1986, respectively), he be provided supplemental consideration for promotion to the grade of senior master sergeant

and chief master sergeant by all appropriate cycles, and, if selected for promotion to a higher grade by the supplemental process, that his records be corrected to show that he retired in the higher grade. The Board's recommendations were accepted and a Memorandum for the Chief of Staff directing implementation of those recommendations was issued on 1 April 1991. For an accounting of the relevant facts of the applicant's service and of the Board's previous consideration of his application, see AFBCMR 90-01947, with Exhibits A through E.

As a result of the final decision in this case, the appropriate office at DFAS computed the monies due and issued a check to the applicant on 5 September 1991. On 27 August 1992, in responding to a query by the applicant, DFAS indicated, in pertinent part, that (1) the correction to the record had no impact on his retired pay, (2) there is no difference in TDY pay because entitlement is based on location and not grade and relocation allowance is a travel entitlement based on mileage and not grade, (3) there was no provision of law authorizing the payment of interest on amounts found due based on correction of military records, and (4) the computation and check issued on 5 September 1991 were correct.

APPLICANT CONTENDS THAT:

The Air Force was aware of the discrepancy in his records since 1974 yet did nothing until he stumbled upon the proper information. When he sought justice from the Board in these matters, he believes that the Board only tried to protect and cover the Air Force and did not care what happened to him and his family.

He applied for appointment as an Army Warrant Officer (WO) in 1983. The Air Force granted him permission knowing that a DoD policy existed that would not allow a member of one service organization to transfer laterally to another. He thought that when he received permission from the Air Force, he would also receive their support; he did not. When he was accepted for entry into training for this Army program, he requested separation from the Air Force and cancellation of his overseas assignment. He was told that because of the needs of the Air Force, he would not be available to enter the Army program until 1 July 1985. He raised this issue in his original application and his complaint was dismissed. He believes that if he had been a master sergeant when he was accepted for WO School, he would have been appointed a WO-1 or WO-2.

As a result of the Board's consideration of his appeal, he received promotions to technical sergeant and master sergeant when first eligible and that is all. But, he went from airman first class to master sergeant, making four pay grades. If he had been a staff sergeant at enlistment, adding four pay grades would have made him a chief master sergeant. The procedures used to give him supplemental consideration for promotion to senior master sergeant were wrong because of all the things that transpired. The error

committed and covered-up by the Air Force since 1972 cost him school and promotion opportunities. The Air Force can keep the rank but he believes he should be financially compensated.

He believes he should be entitled to a much greater settlement than that offered by DFAS. Furthermore, he has previously pointed out that he had been paid all throughout his career for the 1½ years he had between services and should still be entitled to that same pay consideration. This was stopped when he retired in September 1990.

The foregoing contentions, extracted from the applicant's statement to a member of Congress, and the additional documents submitted in support of the appeal, are at Exhibit F.

AIR FORCE EVALUATION:

Pursuant to the Board's request, the Airman Promotion Branch, AFPC/DPPPWB, reviewed the applicant's submission and recommended denial of further promotion in this case. DPPPWB stated that the applicant was provided supplemental promotion consideration for cycles 82S8 through 88S8 using his test score from cycle 90S8 and his board score from cycle 89S8 since they were his highest scores. He was not selected for promotion. DPPPWB stated that the applicant was properly considered for promotion to senior master sergeant for the cycles indicated. Consequently, they are of the opinion that there is no valid reason to reconsider him for promotion for these cycles (Exhibit G).

The Programs and Procedures Branch, AFPC/DPPRP, reviewed the portion of the appeal pertaining to service credit and recommended denial. DPPRP believes that the applicant is confusing what his Reserve service may be used for. He received credit for his Reserve service for calculation of his monthly active duty base pay. This same base pay (which includes credit for Reserve service) was used throughout his active duty career and is still being used in his base pay for retirement pay calculation.

DPPRP indicated that when the applicant retired, the retired pay percentage multiplier was determined by multiplying the applicant's total "active" military service by 2.5%. In the applicant's case, he had 21 years, 1 month and 1 day of active military service. Thus, his percentage multiplier because 52.71%. He was entitled to 52.71% of his monthly active duty base pay (which includes credit for his Reserve service) as his monthly retired pay.

It appears to DPPRP that the applicant believes the Reserve service should have been added to his active service (rather than his base pay rate) to determine the retired pay percentage multiplier. When the applicant retired, there were no provisions in law to use Reserve service to determine the retired pay percentage multiplier.

DPPRP stated that the applicant's service time/dates have been verified and that verification indicates that the applicant was given credit for his Reserve service for active duty pay purpose as evidenced by his Service for Pay date of 5 February 1968. His total active military service date (used to determine the retirement pay percentage multiplier) is listed as 1 August 1969. He did not and should not get credit for Reserve service towards his total active military service and retired pay percentage multiplier.

This evaluation is at Exhibit H.

The Staff Judge Advocate, AFPC/JA, reviewed the applicant's submission and opined that it does not meet the criteria for reconsideration of his case. JA indicated that while many of the documents submitted are new, none of the documents could reasonably be considered "newly discoverable" or "not available" when the petition was originally considered. Furthermore, many of the documents have no relevance to any of the errors or wrongs alleged by the applicant.

After summarizing the applicant's military record, the Board's consideration of his application, and the complaints in his latest submission, JA indicated that in their opinion, he has failed to identify any error in his military records. Furthermore, JA does not believe he has proven any error in the Board's earlier handling of his case. Nor do they believe he is entitled to additional pay for pain and suffering or interest on back pay or that his retired pay was improperly computed.

JA stated that the Board's original analysis of the alleged error in the military record relating to his application to enter Army Ordinance Warrant Officer Training was correct. The applicant alleged error with respect to the Army's handling of his application. Those errors are outside the jurisdiction of the Board. The applicant has alleged that the Air Force thwarted his attempt to enter Army warrant officer training. It is difficult to deduce exactly what the error in the applicant's Air Force records is supposed to be, or what the Air Force did to create this error. JA's best guess is that the applicant's real concern is that he did not become an Army warrant officer due to the actions of the Air Force. Such a complaint, however, is outside the jurisdiction of the Board. If the applicant could provide evidence showing that he did not become a warrant officer through some error (although his submissions do not prove this assertion), correction of that error would require action by the Army Board for Correction of Military Records. Most importantly, JA does not believe that the applicant has proven that the Air Force improperly prevented him from becoming a warrant officer. Every document submitted shows that the Air Force supported the applicant's attempt to enter warrant officer training. It is true that the Air Force moved the applicant to Germany while his application was pending, but there is no evidence to support his assertion that the Air Force prevented him from attending Army warrant officer training.

Even if the applicant had proven an error in his Air Force records with respect to the foregoing matter, JA stated that he would have no remedy -- first, because he never completed the required training; second, because the Board is without authority to appoint him to a warrant officer position in the United States Army; and third, because the United States Air Force had no warrant officers at the time the applicant applied for the Army program -- the last active duty Air Force warrant officer retired on 1 August 1980, and the last Air Force warrant officer was appointed in the late 50s.

JA believes that no error occurred in the handling of the applicant's application and the action taken by the Board. JA opined that the Board's decision to waive the untimely filing and grant the requested relief was, in fact, generous given the applicant's failure to apply in a timely manner aggravated the original error by the Air Force.

As to the applicant's requests for monetary payment for pain and suffering and for interest on his back pay, JA stated that the Board correctly denied this request in the original application. The rule in payment of damages is that the applicant is entitled to any pay and allowances that flow directly from the correction of his records; however, "in no case will the amount found due exceed the amount which would otherwise have been paid or become due had no error or injustice occurred" (32 C.F.R. Section 865.25(a)). Moreover, JA believes payment of interest or pain and suffering in this case would be unconscionable even if it were authorized. The applicant delayed 18 years from his discovery of the error before applying to the Board. Any interest or pain and suffering in this case is not derived from error on the part of the Air Force, but rather by lack of due diligence on the part of the applicant.

JA concurred with the DPPRP advisory opinion concerning the applicant's allegations that his retired pay should be computed to include his inactive Reserve service.

Based on the above, JA does not believe the applicant's submission meets the regulatory standard for reconsideration. Moreover, on the merits, they can discern no error either in the applicant's Air Force Records or in the actions previously taken by the Board (Exhibit I).

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant reviewed the additional advisory opinions and provided the following observations.

JA's statements do not agree with the information he was provided by the Enlistment Branch at AFPC. He was told the Air Force Recruiters implemented new procedures early and caused his predicament. Once again, one office within the Air Force cannot

agree with another. He identified the problem in **1972** but was repeatedly told he was wrong and no one offered any assistance to him. He sought Congressional assistance in 1973 and his congressman was told everything was correctly done. When he contacted AFPC prior to his retirement, it was the first time anyone admitted an error had transpired. Via the documentation he was provided the Air Force did not recognize the error until 1974. The Air Force said it made waiver procedures available to those that were affected but he was never notified.

He does not believe that a person in his position should have to request a waiver to rectify an error. The Air Force had computer records in **1972** and could have corrected the error but elected not to do so. This, in his view, is a travesty.

He reiterated his assertions concerning the timely filing of his application, his application for enrollment in Army WO training, and his service computation.

He does not believe the supplemental considerations he received were appropriate. He was denied schooling and placed in an undue stressful situation as a result of the recruiting error. He had received an Article 15 punishment while assigned to Germany due to an error in judgment and knew his promotion opportunities had ceased. He did not study because he knew there was no reason to do so because he would not receive any further promotions. The Air Force asserted promotion to the two highest grades is extremely competitive. But, they destroyed his competitive edge. He was robbed of schooling or its availability because of his rank. He knows that if he his Air Force enlistment had been handled properly, he would have been promoted to the two highest grades and would have received a direct appointment to WO status and received promotions all the way to the top. There is no doubt in his mind. As a result of an Air Force error, he was screwed for over 18½ years.

The applicant's complete review is at Exhibit K.

THE BOARD CONCLUDES THAT:

1. As a result of the earlier consideration of the applicant's requests, it was directed that his enlistment grade be changed, he be promoted to the grades of technical sergeant and master sergeant when first eligible, and he be provided supplemental consideration for senior master sergeant all the appropriate cycles using his best board score and his best test score from cycles when he had previously been considered. It was further directed that the applicant receive supplemental consideration for promotion to chief master sergeant and retirement in any higher grade for which he may have been selected via the supplemental process, if appropriate. After reviewing all the information provided, we are of the opinion that the applicant was afforded proper and fitting relief based on

the error or injustice when his case was initially considered and that no further relief is warranted.

2. The applicant believes that, because of the injustice which occurred when he was not made aware until recently that a waiver provision for his enlistment grade existed in 1972, he is entitled to extraordinary relief in the form of an unspecified amount of monetary compensation. We disagree. The law under which this Board operates authorizes the payment of monies due as a result of a correction of the record to rectify an error and/or an injustice. Other than the previously approved corrections to the record, aside from direct promotions by this Board to the grades of senior master sergeant to chief master sergeant, the applicant has not stated a request for relief upon which we may properly act. And, we are unpersuaded by the evidence provided that action by this Board to promote the applicant to senior and chief master sergeant is warranted. It is our opinion that he was granted the appropriate relief when he received supplemental consideration for promotion to senior master sergeant using his best scores from the E-8 cycles during which he had already tested and been considered. The applicant contends his promotion considerations were unfair because, throughout his Air Force career, he was deprived of training opportunities due to his rank. He also contends that his inattentiveness to his studies was the fault of the stress he experienced due to the recruiting error which occurred in 1972. with respect to the applicant's asserted long-standing distress, we believe it should be noted that, according to his statements, he was unaware that an error existed until 1992. Notwithstanding this observation, the applicant has provided no evidence that he was improperly denied training for which he was qualified. Furthermore, it would appear to us that the decisions to not enter Army Warrant Officer training and to expend a limited amount of effort studying for testing were personal choices made by the applicant, not decisions made for him by the Air Force. In view of the above and in the absence of any evidence by the applicant showing his records were improperly constituted at the time the previously-directed supplemental considerations were accomplished, we have no basis to recommend his promotion to and retirement in any higher grade.

3. As to the applicant's assertions concerning his retired pay, other than his own assertions, he has provided no evidence showing that, at the time of his retirement, his service credit for determining his entitlement to retired pay was computed in a manner contrary to the law.

4. Accordingly, we agree with the opinions of the appropriate Air Force offices of primary responsibility and conclude that the applicant's requests for further relief should be denied.

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 11 March 1998, under the provisions of AFI 36-[redacted]

[redacted] Panel Chair

[redacted] Member

The following additional documentary evidence was considered:

Exhibit F. Applicant's Letter, dated 15 August 1996, with attachments.
Exhibit G. Letter, AFPC/DPPPWB, dated 27 November 1996, with attachment.
Exhibit H. Letter AFPC/DPPRP, dated 9 December 1996, with attachment.
Exhibit I. Letter, AFPC/JA, dated 7 February 1997.
Exhibit J. Letter, SAF/MIBR, dated 17 February 1997.
Exhibit K. Applicant's Letter, dated 28 March 1997.

[redacted]