RECORD OF PROCEEDINGS

AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: BC-2010-01595

XXXXXXX COUNSEL: MR. XXXXXXXXXX

HEARING DESIRED: YES

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APPLICANT REQUESTS THAT:

His records be corrected to reflect the following:

1.  His retirement was not revoked and he was not removed from the retired rolls of the Air Force.

2.  He was not recalled to active duty to be subjected to a court-martial.

3.  All rights and privileges as a retired member of the Air Force be restored.

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APPLICANT CONTENDS THAT:

1.  AFPC improperly rescinded his retirement, incorrectly relying on provisions of AFI 36-3203, *Service Retirements*, relating to suspending retirement processing to do so. While Table 2.1, Rule 1, of the instruction provides authority to suspend retirement processing when a member is subject to an investigation, rescinding a published retirement order does not constitute suspending retirement “processing.” Paragraph 2.14 indicates that a fully executed retirement order, if regular and valid, is final, and should only be amended or rescinded in rare situations when a member is unable to complete retirement processing before the effective retirement date.

2.  He was not subject to the jurisdiction of the court-martial for the following reasons:

a.  He was retired from the Air Force prior to charges being preferred. Official Air Force documents prove he was improperly retained after his retirement date. The request for his retention beyond his date of separation was not processed in accordance with Air Force instructions. He received a valid retirement certificate on 26 Aug 04 and began terminal leave on 27 Aug 04. His terminal leave orders were never cancelled, rescinded, or amended.

b.  Because he was retired, Secretary of the Air Force (SAF) approval was required, but never obtained, prior to charges being preferred in accordance with AFI 51-201, *Administration of Military Justice.* Additionally, AFI 51-705, *Criminal Jurisdiction of Service Courts of Friendly Foreign Nations and Sending States in the United States,* also requires SAF approval to initiate court-martial action against a member previously tried by state or a foreign court for the same act or omission, but such approval was never obtained.

3.  The underlying basis for the suspension of his retired pay was insufficient. Several provisions of Title 10, United States Code (USC), provide that a retired person cannot be denied entitlement to retired pay; however, his retired pay was suspended based on an unsigned and unprocessed document related to the improper extension of his date estimated return from overseas (DEROS). The document also lacks any reference to a valid Air Force instruction or regulation.

In support of his request, the applicant provides an expanded statement and copies of his retirement order, special orders rescinding the retirement order, and correspondence related to the initiation and subsequent suspension of his retired pay.

The applicant’s complete submission, with attachments, is at Exhibit A.

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STATEMENT OF FACTS:

The relevant facts pertaining to this application are contained in the letters prepared by the appropriate offices of the Air Force. Accordingly, there is no need to recite these facts in this Record of Proceedings.

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AIR FORCE EVALUATION:

AFLOA/JAJM recommends denial, indicating there is no evidence of an error or injustice. He asserts that he was retired on 1 Dec 04, and provides a retirement order and a memo from the Defense Finance and Accounting Service (DFAS) welcoming him to the retired rolls of the Air Force as evidence of his retirement. However, his record of trial makes it clear his retirement was not approved and/or executed, but shows that, on 13 Sep 04, he was put on an administrative hold barring separation due to the investigation against him, which remained in place through his court-martial.

A complete copy of the AFLOA/JAJM evaluation is at Exhibit C.

AFPC/DPSOR recommends denial, indicating there is no evidence of an error or injustice concerning the rescission of the applicant’s retirement order. The applicant cites various provisions of AFI 36-3203, as evidence his retirement should not have been rescinded; however, AFI 36-3203, Table 2.1 provides authority to suspend a retirement when a member is subject to an investigation. His retirement order was suspended on 9 Dec 04 and the applicant’s wing commander requested the Air Force involuntarily suspend his 21 Dec 04 expiration term of service (ETS) for the purpose of court-martial. The applicant is not retired nor was he recalled from retirement for the purpose of court-martial. He was held on active duty for the purpose of court-martial and remains on active duty in military confinement.

A complete copy of the AFPC/DPSOS evaluation is at Exhibit D.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Copies of the Air Force evaluations were forwarded to the applicant on 27 Nov 10 for review and comment within 30 days. As of this date, no response has been received by this office (Exhibit E).

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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 an error or injustice. After careful consideration of applicant's request and the available evidence of record, we find insufficient evidence of error or injustice to warrant corrective action. The facts and opinions stated in the advisory opinions appear to be based on the evidence of record and have not been adequately rebutted by the applicant. Absent persuasive evidence the applicant was denied rights to which he was entitled, appropriate regulations were not followed, or appropriate standards were not applied, we find no basis to disturb the existing record.

4.  The applicant's case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issues involved. Therefore, the request for a hearing is not favorably considered.

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THE BOARD DETERMINES THAT:

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

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The following members of the Board considered AFBCMR Docket Number BC-2010-01595 in Executive Session on 13 Jan 11, under the provisions of AFI 36-2603:

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 19 Jun 09, w/atchs.

Exhibit B. Applicant's Master Personnel Records.

Exhibit C. Letter, AFLOA/JAJM, dated 2 Sep 10.

Exhibit D. Letter, AFPC/DPSOR, dated 8 Oct 10, w/atchs.

Exhibit E. Letter, SAF/MRBR, dated 27 Nov 10.