

## ADDENDUM TO RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

XXXXXXXXXXXXXXXXXX

**DOCKET NUMBER:** BC-2018-00549

**COUNSEL:** XXXXXXXXXXXXXXXX

**HEARING REQUESTED:** YES

### APPLICANT'S REQUEST

Her military retired pay multiplier be changed from 40 percent to 50 percent or 60 percent.

### RESUME OF THE CASE

The applicant is a retired Air Force master sergeant (E-7).

On 11 Jun 13, according to *Mandatory Notification of Career Status Bonus (CSB) Program* memorandum, the applicant acknowledged receipt of notification of the CSB opportunity.

On 24 Sep 13, according to DD Form 2839, *Career Status Bonus (CSB) Election*, the applicant elected to receive the CSB in a single lump payment of \$30,000.

On 17 Dec 19, the Board considered and granted the applicant's request for sufficient service credit to complete a length of service retirement and promotion to the rank of master sergeant (E-7). Competent authority waived any active duty service commitment incurred. In addition, all derogatory information pertaining to sexual assault be declared void and expunged from her records, and the order not to enter [Air Force Base] for 30 years be void and removed from her record.

On 8 Apr 20, according to Special Orders No. XXXXX, effective 31 Dec 18, the applicant was relieved from active duty, organization, and station of assignment, and retired effective 1 Jan 19, in the rank of master sergeant.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letter and Record of Proceedings at Exhibit H.

On 31 Jan 23, the United States Court of Federal Claims remanded the case, instructing the AFBCMR as follows:

1. The remand period shall terminate on 31 Jul 23, and proceedings in this case are stayed until that date. If the AFBCMR fails to issue its decision by the expiration of the remand period, the parties shall file motions with the Court pursuant to RCFC 52.2(c).
2. The government shall file the administrative record on or before 2 Mar 23.

3. Plaintiff shall file her petition with the AFBCMR on or before 1 Apr 23, requesting that the AFBCMR correct her military records pursuant to 10 U.S.C. § 1552 concerning her wrongful discharge and the alleged erroneous/unjust reduction in her retired pay multiplier that is due to her prior election of a career status bonus as reflected in her current military retired pay (i.e., the percentage point reductions in her retired pay due to each full year of creditable service less than 30 years).
4. The parties shall file a joint status report every 90 days from the date of this order until the AFBCMR issues a decision. The joint status reports shall advise the Court of the status of the remand proceedings.
5. The parties SHALL FILE notices pursuant to RCFC 52.2(e) within 30 days of the AFBCMR decision stating whether that decision affords a satisfactory basis for the disposition of the case and whether the parties require further proceedings before the Court.
6. The AFBCMR is DIRECTED to promptly forward by email its decision to plaintiff's counsel of record and to counsel of record for the United States, and to forward two copies to the Clerk of Court pursuant to RCFC 52.2(d).

The United States Court of Federal Claims remand order is at Exhibit I.

On 8 Mar 23, the United States Court of Federal Claims order, provided by the applicant, granted the government's unopposed motion for leave to file the administrative record out of time, on or before 13 Mar 23. Additionally, the government's request for an extension for the applicant to file her petition was granted and extended to on or before 7 Apr 23.

On 4 Apr 23, counsel, on behalf of the applicant, requested the Board correct her official military records to increase her military retired pay multiplier from 40 percent to 50 percent or 60 percent. She contended she appreciated the corrections made by the Air Force Board for Correction of Military Records (AFBCMR); however, at that time, she was not represented by counsel and did not specifically request an increase to her multiplier. The AFBCMR decision recognized she was wrongfully discharged from the Air Force in 2015. Prior to her 2015 discharge, she elected to receive the CSB, and now that she is retired, she receives less in monthly retired pay than her peers, and less than she would have received had she been allowed to continue to serve on active duty in excess of 20 years. Because her military retired pay multiplier has been reduced by the CSB based upon her years of service, her current monthly retired pay in the grade of E-7 is \$1,557, while her friend, an E-6 receives a monthly military retired pay close to \$2,000.

The AFBCMR granted relief to the applicant, on 25 Mar 20, to include the following corrections: (1) Not discharged, but continued to serve until 31 Dec 18, and retired on 1 Jan 19; (2) Promoted to master sergeant (E-7); (3) All derogatory information pertaining to a sexual assault declared void and expunged; and (4) Order not to enter or reenter [Air Force Base] for 30 years be void and removed from records. The relief did not address her reduction in monthly military retired pay due to her acceptance of the CSB.

For the next 17 months, the applicant contacted the Defense Finance and Accounting Service (DFAS) and waited for her pay and retired pay to be calculated. Despite numerous phone calls and inquiries between 25 May 20 and 26 Oct 21, she did not receive back pay for the period 17 Dec 15 through 31 Dec 18. The Department of Veterans Affairs assumed she did receive back pay and asserted a debt against her. On 26 Oct 21, she filed a lawsuit at the United States Court of Federal Claims, and in Aug 22, she received full back pay and the debt against her was resolved. Additionally, the applicant discovered her military retired pay was reduced due to her CSB and wrongful discharge. After serving in the Air Force for 15 years, she accepted the CSB

of \$30,000, which required her to serve in excess of 20 years. She planned to serve on active duty for many more years and never planned to retire at 20 years.

She requests her retired pay multiplier that reduced her monthly military retired pay be changed based on the unique circumstances of her case. Specifically, her retired pay multiplier is 40 percent based on her 20 years of service and her acceptance of the CSB. Because she would have served for more than 20 years had she not been wrongfully separated in 2015, she requested the Board administratively credit her with additional service to increase the CSB multiplier. Prior to her wrongful discharge, her service record was impeccable, she was selected for promotion to the grade of E-6, she performed duties above her grade, and she planned to serve for many more years in the Air Force.

Title 37, United States Code, Section 354 (37 U.S.C. § 354) and Department of Defense (DoD) Financial Management Regulation Volume 7a, Chapter 66 discuss CSB. The applicant was entitled to CSB because she completed 15 years of active duty and planned on serving well in excess of 20 years when she accepted CSB. The DoD manual states, "The Secretary of the Military Department concerned may waive, in whole or in part, the required CSB refund if the Secretary determines that recovery would be against equity and good conscience or contrary to the best interests of the United States."

Per 10 U.S.C. § 1409, the retired pay multiplier is the percentage determined by multiplying 2.5 by the member's years of creditable service. The applicant was given constructive credit for 20 years of service, and multiplied by 2.5, her retired pay multiplier is 50 percent; however, because she received the CSB and served less than 30 years, her percentage multiplier was reduced to 40 percent. Once she reaches the age of 62, it should revert back to 50 percent.

In accordance with Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, the Air Force may correct any military record when the Secretary of the Air Force considers it necessary to correct an error or remove an injustice. Consistent with *Yee v. United States*, 206 Ct. Cl. 388 (1975), *Caddington v. United States*, 147 Ct. Cl. 629, 634 (1959), and *Strickland v. United States*, 69 Fed. Cl. 684, 699 (2006), the AFBCMR has "an abiding moral sanction to determine insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief." The injustice and error are that the applicant was wrongfully discharged from the Air Force before she reached her full potential, and now her monthly military retired pay is significantly lower than had she been allowed to continue to serve in excess of 20 years.

The applicant's complete submission is at Exhibit J.

For more information, see the excerpt of the applicant's record at Exhibit K and the advisory at Exhibit L.

## **AIR FORCE EVALUATION**

AFPC/DPMSSR (Military Retirements and Separations) recommends denying the application. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice as the applicant acknowledged and completed DD Form 2839 electing the CSB and placement in the REDUX retirement pay plan. Title 37 U.S.C. § 354 allowed for a \$30,000 bonus to be paid to members who agreed to continue to serve to at least 20 years Total Active Federal Military Service (TAFMS) and be placed under the REDUX retirement pay plan. During the CSB/REDUX election process, the Military Personnel Flight sent notifications to eligible personnel, which included general information regarding the CSB and resources available for members to use in reaching a decision on the CSB and REDUX plan. If a member chose to elect CSB, they completed DD Form 2839, *Career Status Bonus Election*.

The election was effective, and the member received the CSB payment, on the date the member reached 15 years of TAFMS. If the election was made after 15 years TAFMS, the election would be the date the DD Form 2839 was signed.

The applicant entered service on 2 Dec 98, acknowledged the CSB opportunity on 11 Jun 13, and signed DD Form 2839 on 24 Sep 13, voluntarily electing CSB and placement in the REDUX retirement plan. DD Form 2839, Section IV – *Eligible and Electing to Receive the Career Status Bonus*, paragraph 12 indicated the election was irrevocable as of the election effective date. Additionally, it stated if a member reached retirement, it would be under the provisions of the 1986 Military Retirement Reform Act, known as REDUX, and that future retired pay, when based on length of service, would be reduced under such provisions in the form of a reduced multiplier before age 62 and annual Cost of Living Adjustments would be one percent less than that of other retirement plans. By signing the election, the applicant acknowledged this information and that she received the fact sheet, which explained the details and effects of making the election.

The REDUX retirement plan multiplier is calculated at two percent per year for the first 20 years of service and 3.5 percent for each subsequent year. Less than a full year completed after 20 years is given additional prorated credit. The applicant retired on 1 Jan 19, with 20 years and 29 days TAFMS, with a multiplier of 40 percent. If she had not voluntarily elected the REDUX retirement plan, she would have retired under the High-3 retirement plan, with a multiplier of 50 percent. They cannot speculate on the applicant's willingness or eligibility to continue to serve beyond 20 years TAFMS; however, her retired pay multiplier is correct and valid based on her voluntary election of the REDUX retirement plan.

The complete advisory opinion is at Exhibit L.

#### **APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 26 Apr 23 for comment (Exhibit M), and the applicant replied on 15 May 23. In his response, counsel reiterated the applicant's contentions from her original application regarding her intention to serve beyond 20 years and her wrongful separation in 2015. In response to the advisory opinion stating her retired pay multiplier is correct and valid, the applicant contends this overlooked the second and third level ramifications of the wrongful discharge. She again contends she elected CSB when she was a rising star in the Air Force, planning on serving in excess of 20 years with hopes of future promotion to E-8 or E9. Due to her wrongful discharge in 2015, she did not continue her active service. When the applicant elected the REDUX retirement plan, she was not told she would be wrongfully discharged in 2015. The advisory opinion completely ignores this material aspect of her AFBCMR petition. While the Air Force upgraded her discharge and allowed her to retire, her retired pay continues to be burdened by the wrongful discharge that also affected her multiplier. In her 2018 application for relief, the applicant represented herself and did not realize her military retired pay would be affected by a lower multiplier.

Additionally, the applicant disagrees with the advisory opinion that there is no evidence of an error or injustice and presented clear errors and injustices by showing she was wrongfully discharged and due to the wrongful discharge, her multiplier is 40 percent and her retired pay lower than an E-6 with 20 years of service. This discrepancy effectively shows she continues to bear financial consequences of her wrongful discharge eight years later. Once the applicant reaches 62 years of age, the multiplier will revert to 50 percent, but in the meantime, she continues to pay the price for the wrongful discharge through the lower multiplier.

The applicant does not allege the CSB was received in error and recoupment would not be appropriate because she fulfilled her terms of the agreement as best as she could. Any

recoupment would effectively place her in the same position she is in now. But for the wrongful discharge, she would have continued to serve and excel on active duty until she was properly considered for promotion to E-8 or E-9. She is thankful for the corrections made by the AFBCMR, but this is the last remaining injustice and unfairness she seeks to correct. The advisory opinion does not address the unique circumstances concerning her case that warrant relief.

The applicant's complete response is at Exhibit N.

## **FINDINGS AND CONCLUSION**

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board majority remains unconvinced the evidence presented demonstrates an error or injustice. The applicant contends the corrections the Board previously made to her record failed to provide her full and fitting relief because she receives less in monthly retired pay than her peers, and less than she would have received had she been allowed to continue to serve on active duty in excess of 20 years. The applicant believes this discrepancy in pay is an injustice because she continues to bear the consequences of her wrongful discharge. However, the Board majority disagrees. Based on her voluntary election of the REDUX retirement plan, her retirement pay multiplier is accurate. At the time of her election, in 2013, the applicant acknowledged receipt of the Fact Sheet of Information for Eligible Career Status Bonus Members, which stated the election was irrevocable, the CSB was based on her serving a minimum of 20 years active duty service, and her future retirement pay would be a subject to a reduced multiplier. In return, she would be paid a \$30,000 bonus, which she received. The applicant's contention that her 2015 discharge resulted in the reduction in retirement pay is erroneous. In fact, the previous AFBCMR decision to award the applicant sufficient service credit to allow for a length of service retirement also allowed her to fulfill her CSB agreement and retain the \$30,000 bonus. While the applicant contends it was her intention to serve more than 20 years active duty service, such an outcome is purely speculative and is insufficient basis to provide relief.

The Board also notes the applicant's contention the advisory opinion does not address the unique circumstances concerning her case that warrant relief and the Board has an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief. Nonetheless, the Board considered the entirety of the applicant's cases and concurs with the rationale and recommendation of AFPC/DPMSSR and finds a preponderance of the evidence does not substantiate the applicant's contentions. Furthermore, the Board does not find it in the interest of justice to essentially credit the applicant with a period of active duty service she did not serve solely to permit an adjustment to her retired pay multiplier and entitlement to increased military retired pay. Accordingly, the Board majority recommends against correcting the applicant's records.

4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

## **RECOMMENDATION**

The Board majority recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

## CERTIFICATION

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2018-00549 in Executive Session on 6 Jul 23:

, Chair, AFBCMR  
, Panel Member  
, Panel Member

A majority of the panel voted against correcting the record. **Work-Product** voted to correct the record and did not provide a minority opinion. The panel considered the following:

Exhibit H: Record of Proceedings, w/ Exhibits A-G, dated 23 Mar 20.  
Exhibit I: Court of Federal Claims Remand Order, 31 Jan 23.  
Exhibit J: Application, DD Form 149, w/atchs, dated 14 Apr 23.  
Exhibit K: Documentary evidence, including relevant excerpts from official records.  
Exhibit L: Advisory Opinion, AFPC/DPMSSR, dated 18 Apr 23.  
Exhibit M: Notification of Advisory, SAF/MRBC to Counsel, dated 26 Apr 23.  
Exhibit N: Applicant's Response, dated 15 May 23.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

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Board Operations Manager, AFBCMR