

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXXXXXXXXXX

DOCKET NUMBER: BC-2020-01813-2

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider his request for retroactive backpay for the rank of senior master sergeant (E-8) for the period of 6 Jul 16 through 4 Aug 18 based on substantiated allegations of reprisal pursuant to DODD 7050.06, *Military Whistleblower Protection*, and 10 U.S.C. § 1034.

RESUME OF THE CASE

The applicant is a retired Air National Guard (ANG) senior master sergeant (E-8), awaiting retired pay at age 60.

Per Special Order dated 6 Jul 16, the applicant was administratively demoted from the rank of senior master sergeant to master sergeant with a date of rank (DOR) and effective date of 6 Jul 16, in accordance with AFI 36-2502, *Enlisted Airman Promotion and Demotion Programs*.

Per Special Order dated 14 Apr 20, the Adjutant General (TAG) revoked the applicant's demotion to the rank of master sergeant and reinstated the applicant's rank of senior master sergeant with DOR 1 Jan 14 and effective date of 14 Apr 20; in accordance with AFI 36-2502, paragraph 11.1.4.1.2. The order states the TAG determined the demotion was without an original basis of authority and was null and void.

On 5 Dec 20, the applicant was transferred to the Retired Reserve List in the rank of senior master sergeant.

On 12 Oct 21 and 20 Jan 22, the Board considered and denied his request for reinstatement in the ANG, with retroactive back pay in the rank of senior master sergeant, the resignation of his AGR orders be rescinded and he be reinstated as an Active Guard Reserve (AGR), his denial of reenlistment be void and he be permitted to reenlist, his enlisted performance reports (EPR) be corrected and his election for sanctuary rights be revoked for continued service. The Board reviewed the applicant's complaint of reprisal per 10 U.S.C. § 1034. The Board noted the applicant was the victim of reprisal per the three substantiated allegations pursuant to 10 U.S.C. § 1034 pertaining to the removal of the applicant's right to bear firearms and his nonselection for reenlistment. However, the applicant's records were already corrected for the three substantiated allegations of reprisal. On 1 Dec 18, the TAG reinstated the applicant's right to bear firearms and on 1 Jul 20, his commander selected him for reenlistment. The Board noted the applicant's remaining 11 allegations of reprisal were not substantiated and thus, found insufficient evidence to warrant relief. The applicant contended he was coerced into submitting a voluntary retirement application; however, the Board found no evidence to substantiate this to be the case. The Board also noted it was without authority to reinstate an ANG airman on Title 32 AGR orders as this authority remained with the State.

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 F.

On 18 Jul 22, the applicant requested reconsideration for retroactive back pay for the rank of senior master sergeant for the period of his AGR tour from 6 Jul 16 to 4 Aug 18. Only three of the 13 allegations of reprisal were substantiated. The remaining allegations were investigated for abuse of authority but the inspector general (IG) found processes were followed. However, he had validated medical reasons which precluded him from meeting fitness standards. Effective 14 Apr 20, the TAG reinstated his senior master sergeant DOR to 1 Jan 14. He has yet to receive back pay for the period of 6 Jul 16 to 4 Aug 18 when he resigned under duress for proven retaliatory actions from his command. He remained as a traditional guardsman in an overage position until 5 Dec 20 when he retired. His finance office tried to fix the retroactive pay issue; however, the issue was not resolved before his retirement.

In support of his request for reconsideration the applicant provides: (1) Email thread dated 18 Jul 18, which states he was extended six months involuntarily for grievance adjudication while the investigation report was finalized, at which point he could decide to curtail or extend. However, based on the constant retaliation, he felt he had no recourse but to proceed with retirement; (2) myPers notification dated 24 Apr 20, which advised the applicant his DOR for the rank of senior master sergeant is 1 Jan 14. The myPers notice does not address the applicant's effective date for the rank of senior master sergeant; (3) Email from his finance office which states that the Defense Finance and Accounting Service (DFAS) needed to correct his effective date of promotion to senior master sergeant to 1 Jan 14 to match the revocation of his demotion and that this would entitle him to the back pay difference.

The applicant's complete submission is at Exhibit G.

The military personnel data system (MilPDS) reflects the applicant's DOR for the rank of senior master sergeant is 1 Jan 14, with effective date 14 Apr 20; in accordance with the special order dated 14 Apr 20.

APPLICABLE AUTHORITY/GUIDANCE

Per 10 U.S.C. § 1034 and AFI 90-301, *Inspector General Complaints Resolution*, reprisal against military members for making protected disclosures is prohibited.

DAFI 36-2502, *Enlisted Airman Promotion and Demotion Programs*, paragraph 11.4.4.1.1. Demotions will be announced in special orders published by the appropriate headquarters. The effective date for the demotion will be the date specified by the demotion authority. Paragraph 11.4.1.4.1.2. Demotion orders may be revoked with the approval of the TAG when it has been determined that the order was published without proper authority.

AIR FORCE EVALUATION

NGB/A1PP recommends denial. In accordance with DAFMAN 36-2604, *Service Dates and Dates of Rank*, the DOR in the grade to which an enlisted member is reduced under AFI 36-2502, due to failure to achieve or maintain skill levels, failure to fulfill responsibilities, or failure to keep fit is the same as the effective date of the demotion action.

The complete advisory opinion is at Exhibit I.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 15 Jun 23 for comment (Exhibit J), and the applicant replied on 14 Jul 23. In his response, the applicant contended he had a validated medical condition affecting his ability to meet the abdominal circumference. The reasons were beyond his control and corrected through multiple surgeries. The reinstatement of his rank of senior master sergeant was based on a proven pattern of retaliation under 10 U.S.C. § 1034. The allegations not substantiated were proven to have tampering consequences, thus he was denied due process in the demotion and fitness assessment processes and appeals.

His request is not questioning DAFMAN 36-2604 but is based on the evidence, investigation report and documentation which shows he had a validated and uncontrollable medical condition preventing him from adhering to standards until corrected by surgery. He provided all the documentation; however, his unit disregarded the information and attempted to deny him reenlistment and forced his separation. He was unable to reach 18.5 or 20 years of service for sanctuary based on his command's retaliation and targeted actions.

The applicant's complete response, with attachments, is at Exhibit K.

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 concludes the applicant is the victim of an error or injustice. While the Board notes the recommendation of NGB/A1PP against correcting the record and the applicant's allegation his demotion was in reprisal in violation of 10 U.S.C. § 1034 was not substantiated, the Board finds a preponderance of the evidence substantiates the applicant's contentions. Per Special Order dated 14 Apr 20, the TAG determined the applicant's demotion was without an original basis of authority and revoked the demotion and reinstated his rank of senior master sergeant with his original DOR of 1 Jan 14, effective on 14 Apr 20. Although the order did not reinstate his original effective date for promotion, the Board finds based on the TAG's determination the original demotion was without basis, the applicant's original effective date for promotion should be restored per DAFI 36-2502, paragraph 11.4.4.1.2. Moreover, while the IG determined he was reprised against in the denial of reenlistment and withdrawal of right to bear firearms but was not reprised against in the administrative demotion for failure to meet fitness assessment standards, the Board finds sufficient evidence to conclude the applicant's medical conditions were mitigating and contributing factors to his fitness assessment failures. The IO also indicated, and the Board agrees, there was a failure to take proper measures to promote and safeguard the applicant's well-being. Therefore, in the interest of justice, the Board recommends correcting the applicant's records as indicated below.
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 pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show:

- a. His effective date for promotion to the rank of senior master sergeant of 1 Jan 14 be reinstated.
- b. He receive back pay and associated benefits for pay grade E-8, effective 1 Jan 14.

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-2020-01813-2 in Executive Session on 17 Aug 23:

- , Panel Chair
- , Panel Member
- , Panel Member

All members voted to correct the record. The panel considered the following:

- Exhibit F: Record of Proceedings, w/ Exhibits A-E, dated 22 Feb 22 .
- Exhibit G: Application, DD Form 149, w/atchs, dated 18 Jul 22.
- Exhibit H: Documentary evidence, including relevant excerpts from official records.
- Exhibit I: Advisory Opinion, NGB/A1PP, w/atchs, dated 5 Jun 23.
- Exhibit J: Notification of Advisory, SAF/MRBC to Applicant, dated 15 Jun 23.
- Exhibit K: Applicant's Response, w/atchs, dated 14 Jul 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.