

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-00405

XXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. Correct his records to reflect his advancement to the of rank master sergeant (E-7), effective 8 Sep 01.
2. He receive full retroactive payment as an E-7 he is entitled to for the period 8 Sep 01 through 5 Aug 14.

APPLICANT'S CONTENTIONS

He retired on 1 May 92, in the rank of technical sergeant (E-6) and was advanced to the rank of master sergeant on 1 Sep 01 [sic] in accordance with 10 U.S.C. § 8964. On 7 Jan 02, he sent the Defense Finance and Accounting Service (DFAS) a letter and copy of the orders advancing him to master sergeant. He inquired about receiving master sergeant retired pay instead of technical sergeant retired pay; however, DFAS did not reply, so he thought the advancement was just an administrative action. In Sep 20, he discovered he should be receiving retired pay at the higher grade of E-7. He contacted DFAS again, they verified the mistake, and gave him retroactive retired E-7 pay for the period 6 Aug 14 through 31 Aug 20. However, in accordance with 31 U.S.C. § 3702 (Barring Act), DFAS was prohibited from giving him back pay for the period prior to 6 Aug 14. DFAS recommended he seek relief for the remaining entitled back pay via the Board process.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 7 Mar 92, the applicant received nonjudicial punishment under Section 15, [State] Code of Military Justice (CMJ) for wearing unauthorized insignia, decoration, badge, ribbon, device or lapel button, in violation of Section 134, [State] CMJ. His punishment was a reduction in grade from E-7 to E-6.

On 30 Apr 92, the applicant was relieved from his present Reserve assignment, transferred to the Retired Reserve, and placed on the United States Air Force Retired List, effective 1 May 92 as a technical sergeant, having served 20 years, 7 months, and 24 days of active service.

On 8 Sep 01, according to Special Order XX-XXX, dated 30 Sep 92, submitted by the applicant, he was advanced to the rank of master sergeant.

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

APPLICABLE AUTHORITY/GUIDANCE

10 U.S.C. §8964, *Higher grade after 30 years of service: warrant officers and enlisted members.*

Each retired member of the Air Force who is retired with less than 30 years of active service is entitled, when his active service plus his service on the retired list totals 30 years, to be advanced to the highest grade in which he served on active duty satisfactorily, as determined by the Secretary of the Air Force.

31 U.S.C. § 3702 (Barring Act): *Authority to settle claims.* A claim against the Government presented under this section must contain the signature and address of the claimant or an authorized representative. The claim must be received by the official responsible under subsection (a) for settling the claim or by the agency that conducts the activity from which the claim arises within six years after the claim accrues. The Secretary of Defense may waive the time limitations set forth in subsection (b) or (c) in the case of a claim referred to in subsection (a)(1)(A). In the case of a claim by or with respect to a member of the uniformed services who is not under the jurisdiction of the Secretary of a military department, such a waiver may be made only upon the request of the Secretary concerned (as defined in 37 U.S.C. §101).

AIR FORCE EVALUATION

DFAS-JFBEB/CL recommends granting the application. The applicant retired from active duty on 1 May 92, in the rank of technical sergeant (E-6), under retirement law 10 U.S.C. §8914. He received special orders, dated 30 Sep 92, advancing him to master sergeant (E-7) upon his new retirement date of 8 Sep 01, under Retirement Law 10 U.S.C. § 8964.

In Jan 02, the applicant sent a letter to DFAS reminding them to correct his record to reflect the higher grade, but DFAS took no action, and his retirement pay grade remained at E-6 for over 18 years. In Jul 20, he again inquired about his incorrect pay grade. DFAS took action by correcting his record and paying him retroactive retired E-7 pay for the period 6 Aug 14 through 31 Aug 20. Retroactive pay for the period 8 Sep 01 through 5 Aug 14, was barred under 37 U.S.C. § 3702 (Barring Act). To avoid any application of the Barring Act, a claimant would have had to periodically “present a claim” and note DFAS’ ongoing and persistent error at least at regular six-year intervals from his 8 Sep 01 retirement date, that is, 8 Sep 07, 8 Sep 13, and finally 8 Sep 19. This he did not do.

DFAS does not have the authority to waive the Barring Statute. If the Board should authorize waiver of the Barring Statute, the applicant would be entitled to his retroactive retired E-7 pay, that he is rightfully due, covering the requested period 8 Sep 01 through 5 Aug 14, and DFAS will make the payment.

The complete advisory opinion is at Exhibit C.

APPLICANT’S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 12 Jul 22, for comment (Exhibit D) but has received no response.

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. The Board concurs with the rationale and recommendation of DFAS-JFBEB/CL and finds a preponderance of the evidence substantiates the applicant’s contentions. Specifically, the applicant timely notified DFAS of the need to correct his pay record to reflect his pay grade of E-

7 in accordance with Retirement Law 10 U.S.C. § 8964; however, they failed to take the appropriate action. Therefore, the Board recommends correcting the applicant's records as indicated below.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show:

a. On 8 Sep 01, he was advanced to the rank of master sergeant (E-7) pursuant to Title 10 United States Code, Section 8964 and submitted a timely and effective request to correct his rank from technical sergeant (E-6) to master sergeant (E-7).

b. On 8 Sep 07, 8 Sep 13, and 8 Sep 19, he presented a claim and noted the Defense Finance and Accounting Service's ongoing and persistent error regarding his retired pay.

c. He is entitled to retroactive retired pay in the amount of \$45,937.40, for the period 8 Sep 01 to 5 Aug 14.

d. To date, the aforementioned payments have not been made.

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-2021-00405 in Executive Session on 17 Nov 22:

Panel Chair
Panel Member
Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 18 Feb 22.

Exhibit B: Documentary evidence, including relevant excerpts from official records.

Exhibit C: Advisory opinion, DFAS/JFBEB/CL, w/atch, dated 12 Jul 22.

Exhibit D: Notification of advisory, SAF/MRBC to applicant, dated 12 Jul 22.

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