



Work-Product

**UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS**

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-01567-2

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT’S REQUEST

The Board reconsider her request for a 20-year active-duty retirement.

RESUME OF THE CASE

The applicant is a former Air Force staff sergeant (E-5) who was honorably discharged on 14 Feb 21 with 20 years and 1 day of active service.

On 1 Mar 22, the Board considered and denied her request for a 20-year active-duty retirement; finding the applicant had provided insufficient evidence of an error or injustice to justify relief. The Board concurred with the rationale and recommendation of SAF/MRBP and found a preponderance of the evidence did not substantiate the applicant’s contentions. The applicant stated, due to an administrative error/insufficient time to process her lengthy service probation (LSP) request, this request did not reach the Air Force Personnel Center (AFPC) for processing prior to her separation. This administrative error was outside of her control and resulted in her separating versus retiring from the Air Force. While the Board noted the email traffic between the First Sergeant and the local Judge Advocate Office submitted by the applicant revealing an administrative error occurred while processing her LSP; the Board found insufficient evidence the LSP would have been approved due to her drug use.

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 I.

On 23 Feb 23, the applicant requested reconsideration of her request for a 20-year active-duty retirement. She again contends, through counsel, she completed 20 years of service at the time of separation, and she should not need to serve to the first day of the following month. A complete failure of her command to properly process her LSP request, a failure to notify her of her regulatory right to request a retirement, and the false/erroneous information provided to her, resulted in an egregious deprivation of her right to a retirement.

There is no statutory or regulatory provision mandating airmen who have reached 20 years of service remain on active duty to reach the first day of the following month. The Comptroller General addressed this issue in the Department of Defense Military Pay and Allowance Committee

Action Number 544, dated 2 Sep 80. The advisory opinion in the previous case incorrectly interpreted 5 U.S.C. Section 8301 which is clearly meant to create an administrative requirement of when retirees are placed on the retirement rolls.

The prior Board's decision placed an undue burden on her and ignored key facts. The Board noted the Administrative Discharge Board results were approved on 25 Jan 21 and she should have followed up on her request for lengthy service consideration, but it appeared no action was taken until after her separation effective date. This finding fails to acknowledge the number of emails to resolve her LSP request, her Defense Counsel's attempts to ensure she remain on active duty to reach retirement eligibility and the erroneous information provided, her unit's failure to timely act on her case despite the awareness of the high year tenure (HYT) date, and other mitigating factors. Their decision finding her HYT was more favorable, completely ignores the probability she may have been granted additional time on active duty to request retirement. Granting her LSP request and allowing her to retire would have been consistent with a number of cases where the member, whose sole misconduct was marijuana use, was given nonjudicial punishment and allowed to retire.

In support of her reconsideration request, the applicant submitted the following new evidence: (1) an affidavit; and (2) the U.S. Comptroller General Excerpt.

The applicant's complete submission is at Exhibit J.

AIR FORCE EVALUATION

AFPC/JA recommends granting the application to show she was not separated on 14 Feb 21, but rather she remained on active duty through 28 Feb 21 and was retired for length of service, effective 1 Mar 21. The applicant was entitled to lengthy service consideration per AFI 36-3208, *Administrative Separation of Airmen*, paragraph 6.35. The applicant timely filed a request for LSP consideration and due to no fault of her own, the application was never considered by the appropriate case disposition authorities. Consequently, after waiting nearly five months for the decision regarding her LSP request, the applicant was separated in accordance with HYT rules without being afforded her due process. This inordinate delay in processing the LSP request, coupled with the erroneous advice regarding the applicant's ability to extend beyond her HYT to allow for the request to be processed is significant. Had the applicant remained on active duty beyond her HYT, the request for lengthy service consideration should have been converted to a request for retirement in lieu of discharge which would have required review by the Secretary of the Air Force Personnel Council. Essentially, because of these processing errors, the applicant not only missed out on her opportunity to have her LSP application acted on, but she was also denied her entitlement to be considered for retirement.

It is worth noting in the prior AFBCMR record of proceedings, the Board correctly acknowledged there was a significant "administrative breakdown" and "inordinate delays" in processing the applicant's LSP request. However, the Board erroneously faults the applicant for "failing to follow-up" and for "electing to separate" prior to her retirement eligibility. This characterization is not supported by the controlling guidance or facts. AFI 36-3208 clearly states once an eligible member makes a timely LSP application, it is the government's responsibility to follow its

procedures and not discharge the member until the case has been referred to the case disposition authority. Additionally, the applicant did not “elect” to separate. Rather she was improperly advised by AFPC and MPF personnel that she was prohibited from extending beyond her HYT which was in direct contravention of AFI 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force*, Table 6.2, Rules 22 and 23. Additionally, the prior Board opined on the low likelihood of success of the applicant’s LSP request being approved had it been forwarded to the proper case disposition authorities. However, this opinion is outside the scope of the Board’s purview in this case. Specifically, the applicant is seeking redress because her request for relief never made it to the proper authorities before she was separated from active duty, due to no fault of her own. To suggest that it is of no consequence completely ignores the gravity of her due process rights and what she potentially lost because the government did not follow its own rules. Federal courts have consistently defined “injustice” within the meaning of 10 U.S.C. 1552 as that behavior or action that rises to a level that shocks the conscience (*Sawyer v. United States*, 18 Ct.Cl.800 (1989)). Based on the unreasonable delay in case processing, erroneous advice, and failure to follow its own policy and guidance, the government has fashioned a case that rises to that level.

The complete advisory opinion is at Exhibit K.

AFPC/DPMSSR (Retirement) acknowledges administrative errors occurred in the processing of her administrative discharge and lengthy service consideration request; however, at the time of separation, the applicant did not complete the active service to reach the minimum retirement date (1 Mar 21) required by law. If the Board elects to approve the request, the directive should change the applicant’s record to show she was not separated on 14 Feb 21, but rather she remained on active duty through 28 Feb 21 and was retired for length of service effective 1 Mar 21.

On 14 Feb 21, the applicant was released from active duty with 20 years and 1 day of active service. Per 10 U.S.C. Section 09314, under regulations to be prescribed by the Secretary of the Air Force, a regular enlisted member of the Air Force or the Space Force who has at least 20, but less than 30 years of service computed under section 9325 of this title may, upon request, be retired. Legal requirements also dictate non-disability active-duty retirements will occur on the first day of the month. This is outlined in 5 U.S.C. Section 8301, which states accept as otherwise specifically provided by this title or other statute, retirement authorized by statute is effective on the first day of the month following the month in which retirement would otherwise be effective.

On 17 Mar 20, the applicant did submit a request to retire, effective 1 Mar 21. In the commander’s coordination of the retirement application, the commander identified the pending administrative discharge. AFI 36-3203, *Service Retirements*, table 2.2, rule 3, indicates a pending administrative discharge creates a restriction to retirement and the service member must be approved for a waiver of this restriction to retire. The applicant’s counsel contends her application should have been suspended rather than disapproved; however, note 10 of table 2.2, which applies to rule 3, indicates, at the time of the application, the applicant had to have completed at least 20 years Total Active Federal Military Service (TAFMS) to be eligible to request a waiver of the retirement restriction. Since the applicant had less than 20 years of TAFMS at the time of the application, she was ineligible to request a waiver to the restriction due to her years of service and her application was appropriately disapproved vice being placed in suspended status.

Prior to her demotion, the applicant had extended her enlistment to Apr 24 but, upon her demotion, the HYT and date of separation (DOS) was curtailed to coincide with the HYT for the lower grade. In the applicant's supporting evidence, an email response indicated the applicant could not be extended beyond HYT due to a command-directed hold and she would be separated at HYT. However, due to the pending discharge action, the applicant could have been retained until her original contractual DOS; and, if she desired, the applicant could have requested a voluntary HYT extension and extended her contractual DOS, as needed, to await the outcome of the discharge action. Had the applicant remained on active duty beyond her HYT, the request for lengthy service consideration could have been converted to a request for retirement in lieu of discharge which would have required review by the Secretary of the Air Force Personnel Council. In that request, the applicant would have had to provide sufficient evidence to convince the Personnel Council to overturn the discharge board's decision.

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 24 Oct 23 for comment (Exhibit M), and the applicant replied on 10 Nov 23. In her response, through counsel, the applicant agrees with the advisory opinion from AFPC/JA recommending she was not separated on 14 Feb 21, but rather she remained on active duty through 28 Feb 21 and was retired for length of service effective 1 Mar 21. Both advisory opinions confirm the facts presented by her and acknowledge she served on active duty in the Air Force for twenty years and one day. Furthermore, both advisory opinions acknowledge she was discharged from the Air Force despite her efforts to obtain LSP consideration and retirement consideration. Despite acknowledging she appropriately submitted her request for LSP and administrative errors occurred denying her the opportunity for her request to be considered by the appropriate authority, the AFPC/DPMSSR advisory fails to address the failure of the Air Force to properly process the request and its adverse impact on her. The AFPC/JA advisory opinion is in accord, factually and legally, with her petition to this Board. This advisory opinion affirms her argument that she: 1) completed the statutory requirement for retirement by serving honorably for 20 years; 2) did not elect to separate; and 3) was unjustly denied her right to have her LSP request decided by the AF's designated authority.

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 concludes the applicant is the victim of an error or injustice. The Board concurs with the rationale and recommendation of AFPC/JA and finds a preponderance of the evidence substantiates the applicant's contentions. The applicant had between 16 and 20 years of service and should have been entitled to lengthy service consideration.

The Board finds she appropriately submitted her request; however, due to administrative errors, her request was not considered by the appropriate authority. Therefore, 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. She was not separated on 14 February 2021 but instead remained on active duty through 28 February 2021 and was retired for length of service, effective 1 March 2021.
- b. Her election of the Survivor Benefit Plan option will be corrected in accordance with her expressed preferences and/or as otherwise provided for by law or the Code of Federal Regulations.

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-2021-01567-2 in Executive Session on 20 Dec 23:

- Work-Product Panel Chair
- Work-Product, Panel Member
- Work-Product Panel Member

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

- Exhibit I: Record of Proceedings, w/ Exhibits A-H, dated 1 Mar 22.
- Exhibit J: Application, DD Form 149, w/atchs, dated 23 Feb 23.
- Exhibit K: Advisory Opinion, AFPC/JA, dated 16 Oct 23.
- Exhibit L: Advisory Opinion, AFPC/DPMSSR, dated 18 Oct 23.
- Exhibit M: Notification of Advisory, SAF/MRBC to Applicant, dated 24 Oct 23.
- Exhibit N: Applicant’s Response, dated 10 Nov 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.

12/22/2023

Work-Product

Board Operations Manager, AFBCMR
Signed by: USAF