



CUI//SP-MIL/SP-PRVCY

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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2022-00541

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

Reinstatement of his retired rank of major (O-4).

APPLICANT'S CONTENTIONS

He was unjustly demoted to the rank of captain (O-3) six months after his retirement as a major by a legislative change, Fiscal Year 2021 National Defense Authorization Act (FY21 NDAA), that increased the time-in-grade requirement from six months to three years for majors to retire in that grade.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force captain.

On 9 Sep 98, according to DD Form 4, *Enlistment/Reenlistment Document – Armed Forces of the United States*, the applicant entered the Regular Air Force.

On 25 Oct 10, according to Special Order *Work-Product*, dated 26 Oct 10, the applicant was relieved from assignment, and honorably discharged. By direction of the President, the applicant was appointed a Regular officer of the Air Force in the rank of second lieutenant (O-1), effective 26 Oct 10.

On 1 Aug 20, according to Special Order *Work-Product*, dated 1 Aug 20, the applicant was promoted to the permanent rank of major, with the same date of rank.

On 31 Jul 21, according to Special Orders No. *Work-Product*, dated 4 Aug 20, the applicant was relieved from active duty, and retired effective 1 Aug 21 per AFI 36-3203, *Service Retirements*, in the rank of major.

On 3 Jan 22, according to Special Orders No. *Work-Product*, dated 3 Jan 22, the applicant's retirement orders No. *Work-Product*, dated 4 Aug 20, were amended changing his retired rank to captain. Time-in-grade requirement was revised in Public Law 116-283, FY21 NDAA. The applicant was under the High-3 retirement plan; therefore, the change does not impact retired pay.

On 6 Jan 22, according to documentation submitted by the applicant, the Chief, Military Sustainment and Transition Division, Air Force Personnel Center (AFPC), sent a letter advising

**AFBCMR Docket Number BC-2022-00541
CUI//SP-MIL/SP-PRVCY**

Controlled by: SAF/MRB
CUI Categories: SP-MIL/SP-PRVCY
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

CUI//SP-MIL/SP-PRVCY

the applicant that in the FY21 NDAA, Congress increased the service-in-grade requirement from six months to three years for majors in order to retire in that grade. Air Staff attempted to get the law changed to grandfather those approved to retire or who retired in calendar year 2021, but Congress did not approve the amendment. The applicant did not complete at least three years' service-in-grade time as a major prior to retiring; therefore, they are legally bound to change his retired rank from major to captain. Further, he was advised he could pursue a waiver to the time-in-grade requirement.

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

AIR FORCE EVALUATION

AFPC/DP2SSR recommends denying the application. The applicant retired effective 1 Aug 21, with one year time-in-grade as a major. In the FY21 NDAA, Congress increased the service-in-grade time requirement from six months to three years for majors in order to retire in that grade. The Air Force, along with the Navy, discovered the legislative change in late Jun 21, and the Army discovered it shortly before then. The change was implemented immediately for new retiree applicants; however, they chose to temporarily delay notifying officers who were approved before the discovery. The Air Staff worked with the Air Force Legislative Liaison office to draft language to potentially grandfather-in those officers approved for retirement prior to the discovery of the change. Unfortunately, these efforts were unsuccessful.

This new requirement is outlined in 10 U.S.C. § 1370 (a) (1), *Regular commissioned officers*, subparagraph (b) *Retirement of Officers Retiring Voluntarily*:

(1) Service-in-Grade requirement. In order to be eligible for voluntary retirement under any provision of this title in a grade above the rank of captain in the Army, Air Force, or Marine Corps, lieutenant in the Navy, or the equivalent grade in the Space Force, a commissioned officer of the Army, Navy, Air Force, Marine Corps, or Space Force must have served on active duty in that grade for a period of not less than three years, except that -

(A) subject to subsection (c), the Secretary of Defense (SECDEF) may reduce such period to a period of not less than two years for any officer; and

(B) in the case of an officer to be retired in a grade at or below the grade of major general in the Army, Air Force, or Marine Corps, rear admiral in the Navy, or an equivalent grade in the Space Force, the SECDEF may authorize the Secretary of the military department concerned to reduce such period to a period of not less than two years.

10 U.S.C. § 1370, paragraph (b)(3) allows the President of the United States (POTUS) to approve longer waivers in individual cases involving extreme hardship or exceptional or unusual circumstances. The Office of the Secretary of Defense (OSD) will not support waivers that require approval by the POTUS if they are based on the legislative change alone.

Impacts of the legislative change on the applicant:

- He is under the High-3 retirement plan: his retired pay based on an average of the highest 36 months of pay received before retirement. He will not see an adjustment of his retired pay.
- His retirement order will list the highest grade held (major) as well as the retired grade (captain).

CUI//SP-MIL/SP-PRVCY

- His DD Form 214 contains the highest grade held (major), the grade held on his last day of active duty.
- His retired identification card should show the retired grade (captain).
- He is entitled to shipment of household goods for the higher grade (major) allowance.
- If desired in the future, his family can obtain a Department of Veterans Affairs' headstone and marker inscribed with his highest grade held (major).

There is no financial impact on the applicant and other modifications to his record are minimal. This legislative change impacts all services and all majors retiring on or after 1 Jan 21. It is unfortunate the applicant was notified of the change after his retirement effective date. However, he has not provided evidence to show why a waiver should be granted for him over all others impacted by the change.

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 Apr 22, for comment (Exhibit D) but has received no response.

ADDITIONAL AIR FORCE EVALUATION

AF/A1PP provided a master advisory on applications for correction of military records due to the FY21 NDAA increase of the voluntary retirement service-in-grade requirement for regular commissioned officers in the grade of O-4 from six months to three years. This change effective 1 Jan 21, was enacted in law without a grace period or prior coordination with the Services. Upon discovery of the change, the Air Force identified 96 officers (Airmen) impacted. The Air Force implemented the new O-4 service-in-grade requirement for all new retirement applicants. At the same time the Air Staff worked with the Air Force Legislative Liaison office to draft language into the FY22 NDAA that would grandfather-in those Airmen approved for retirement prior to discovery of the FY21 NDAA O-4 service-in-grade change. These efforts proved unsuccessful.

10 U.S.C. § 1370, paragraph (b)(3), allows only the POTUS to waive less than 2 years' service-in-grade. 10 U.S.C. § 1370, paragraph (b)(2) allows the SECDEF (or if delegated, the Service Secretary) to waive less than 3, but more than 2 years' service-in-grade. In Nov 21, the SECDEF delegated service-in-grade waiver authority to the Service Secretaries. With the SECDEF service-in-grade waiver authority delegated to the Secretary of the Air Force (SECAF), AFPC/A1PP charted a course of action to address support to the 96 Airmen impacted. For those pending retirement, AFPC contacted each Airman to offer them the opportunity to return to Active Duty to complete the required service-in-grade. All affected Airmen declined this option. For those Airmen with more than 2 years but less than 3 years' service-in-grade (44 total) the SECAF approved service-in-grade waivers in Feb 22. The Air Force did not seek a POTUS-level service-in-grade waiver on behalf of those Airmen with less than 2 years' service-in-grade given the high-precedent threshold for POTUS waivers. Those Airmen were notified in writing of the service-in-grade changes and advised of the option to pursue a waiver via the Air Force Board for Correction of Military Records.

It is Congressionally directed that all services must comply with the service-in-grade statute, as written. Each affected Airman were offered all reasonable and statutorily authorized options for relief from any unwanted administrative impact following this new Congressional direction. There is no monetary impact on the applicants' retirement pay or Veterans Affairs benefits, and

modifications to each record were minimal. Therefore, they do not find the service-in-grade adjustment created any error or injustice on behalf of the Air Force. Should the Board choose to seek an after-the-fact waiver, it could only be approved by the POTUS.

The complete advisory opinion is at Exhibit E.

APPLICANT’S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 21 Feb 23, for comment (Exhibit F) 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 not the victim of an error or injustice. The Board concurs with the rationale and recommendation of AFPC/DP2SSR and AF/A1PP and finds a preponderance of the evidence does not substantiate the applicant’s contentions. The FY21 NDAA legislative change (10 U.S.C. §1370) increasing the service-in-grade requirement from six months to three years for majors to retire in that grade, impacted all Services and all majors retiring on or after 1 Jan 21. The Board notes the legislative change did allow the Service Secretaries to waive the three-year requirement for those officers with more than two-years but less than three years’ service-in-grade. However, the applicant only had one year service-in-grade as a major and has not provided any evidence of extreme hardship or exceptional or unusual circumstances that warrant pursuit of a POTUS waiver over all other officers impacted by the legislative change. Therefore, the Board 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 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-2022-00541 in Executive Session on 15 Dec 22 and 20 Apr 23:

<i>Work-Product</i>	Panel Chair
<i>Work-Product</i>	Panel Member
<i>Work-Product</i>	Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 4 Feb 22.

CUI//SP-MIL/SP-PRVCY

- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DP2SSR dated 11 Apr 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 12 Apr 22.
- Exhibit E: Advisory Opinion, AF/A1PP, dated 20 Dec 22
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 21 Feb 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.

6/1/2023

X *Work-Product*

Board Operations Manager, AFBCMR
Signed by: *Work-Product*