
RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-01968

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

Reinstatement of her retired rank/grade of major (O-4).

APPLICANT'S CONTENTIONS

She was unjustly demoted to the rank of captain (O-3) six months after her retirement as a major (O-4) by a legislative change Fiscal Year 2021 National Defense Authorization Act (FY 21 NDAA), that increased the service-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 1 Jul 20, according to Special Order J **Work-Product**, dated 1 Jul 20, the applicant was promoted to the permanent rank of major, with the same date of rank.

On 30 Jun 21, according to Special Orders No. **Work-Product** dated 10 Jul 20, the applicant was relieved from active duty, and retired effective 1 Jul 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 10 Jul 20, were amended changing her 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 & Transition Division, Air Force Personnel Center (AFPC), sent a letter advising her 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 as a major prior to retiring; therefore, they are legally bound to change her retired rank from major to captain. Further, she was advised she could pursue a waiver to the time-in-grade requirement.

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Work-Product

Controlled by: SAF/MRB

Work-Product

Limited Dissemination Control: N/A

POC: SAF.MRBC.Workflow@us.af.mil

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

AIR FORCE EVALUATION

AFPC/DP2SSR recommends denying the application. In the FY 21 NDAA, Congress increased the time-in-grade requirement from six months to three years for majors in order to retire in that grade. Due to this AFPC was legally bound to change the applicant's retired rank from major to captain. In Jan 22, the applicant was sent a notification letter regarding this change in the NDAA law, advising her this change had no financial effect on her retired pay or DD Form 214, *Certificate of Release or Discharge from Active Duty*, that her retirement orders will be amended to reflect the correct retired rank of captain, and that her retired ID card should be updated to reflect the rank of captain.

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

ADDITIONAL AIR FORCE EVALUATION

AFPC/DPMSSR recommends denying the application. The applicant retired effective 1 Jul 21, with one-year of time-in-grade as a major. The FY21 NDAA, effective 1 Jan 21, outlined in 10 U.S.C. § 1370(a)(1), *Regular commissioned officers*, subparagraph (b), *Retirement of Officers Retiring Voluntarily*; increased the time-in-grade requirement from six months to three years for majors in the Army, Air Force, Marines, lieutenants in the Navy, or the equivalent in the Space Force, in order to retire in that grade, except that:

- The Secretary of Defense (SECDEF) may reduce such period of not less than two years for any officer; and
- The SECDEF may authorize the Secretary of the military department concerned to reduce such a 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.

The Services did not discover the legislative change until Jun 21. At the time of discovery, AFPC/DP3SA notified AF/A1PPS, and their office began discussions with SAF/LL and SAF/GC on how to proceed. Air Staff worked with SAF/LL to draft language grandfathering those officers approved for retirement prior to discovery of the legislative change, but unfortunately, those efforts were unsuccessful/not included in the FY22 NDAA. In Dec 21, Air Staff in discussions with OSD, found there was "no appetite" from the other Services or OSD to pursue a waiver for those who had not completed at least 2 years' time-in-grade since that would require a waiver by the POTUS, and the impacts were minimal. On 6 Jan 22, AFPC sent notifications to the officers who were retired with less than 2 years' time-in grade, advising them of the situation, the change to their retired grade, and the impacts of the legislative change. Specifically, impacts of the legislative change to the applicant:

- The applicant is under the High-3 retirement plan and her retired pay was based on an average of the highest 36 months of pay received prior to retirement. Because of this, the applicant WILL NOT see an adjustment of her retired pay.
- The applicant's retirement order contains the highest grade held (major) as well as the retired grade (captain).
- The applicant's DD Form 214, *Certificate of Release or Discharge from Active Duty* contains the highest grade held (major), because that is the grade held by the applicant on her last day of active duty.
- The grade on the applicant's retired identification card should show the retired grade (captain).
- The applicant is entitled to shipment of household goods for the higher grade (major) allowance.
- If desired in the future, the applicant's family can obtain a Department of Veterans Affairs' headstone and marker inscribed with the applicant's highest grade held (major).

Pursuant to 10 U.S.C. § 1370(a)(1), subparagraph (b) (2), allowing the SECDEF (or if delegated, the Service Secretary) to waive the time-in-grade requirement when a member has completed at least two but less than three years of time-in-grade. Based on the available waiver authority, the Services elected to pursue waivers for those officers who had completed at least two years of time-in-grade. This legislative change impacts all services and all majors retiring on or after 1 Jan 21. While it is unfortunate the applicant was notified of the change after her retirement effective date, she has not provided evidence to show why a waiver should be granted for her over all others impacted by the change. Should the Board choose to seek an after-the-fact waiver from the POTUS, recommend all impacted officers, as well as the applicant, be considered for inclusion.

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 20 Jan 23, for comment (Exhibit F) but has received no response.

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 G.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 21 Feb 23 for comment (Exhibit H) 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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2022-01968 in Executive Session on 20 Apr 23:

Work-Product

Panel Chair
el Member
el Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 20 Jul 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DP2SSR, dated 8 Aug 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 8 Aug 22.
- Exhibit E: Advisory Opinion, AFPC/DPMSSR, dated 19 Jan 23.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 20 Jan 23.
- Exhibit G: Advisory Opinion, AF/A1PP, dated 20 Dec 22.
- Exhibit H: 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 AFI 36-2603, paragraph 4.11.9.

6/1/2023

X

Work-Product

Board Operations Manager, AFBCMR

Signed by:

Work-Product