

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-03223

XXXXXXXXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. She be eligible for retirement upon reaching age 62, rather than being separated.
2. Any other relief the Board deems just and proper.

APPLICANT'S CONTENTIONS

Counsel, on behalf of the applicant, contends the Air Force's refusal to fulfil its commitment she could be retired upon reaching age 62 with less than 20 years of service in accordance with 10 U.S.C. § 1251 is a material error and/or injustice. In 2012, an Air Force recruiter contacted her as the Air Force needed experienced dentists. Before signing a contract, she and her husband inquired about retirement. The recruiter reached out to AFPC and the Chief of the Retirements and Separations Branch confirmed the entitlement to a military retirement with less than 20 years of service. Given this guidance, she chose to give up her private practice and commission in the Air Force. Based on assurances from AFPC, she agreed to leave her successful practice as a civilian dentist and commission in the Air Force at the age of 50. She now faces the possibility of being separated without retirement benefits when she turns 62 years old in 2024. Without the benefits, she bears the burden of providing for her family while being deprived of a pension and healthcare benefits.

On 26 Dec 19, the Office of the Under Secretary of Defense for Personnel and Readiness (OUSD P&R) directed all services to immediately stop processing all pending retirement actions under 10 U.S.C. § 1251 for officers with less than 20 years of service. The OUSD P&R further instructed services to ensure officers are not recruited with assertions suggesting they may be eligible for a non-disability retirement with less than 20 years of service. Not long after, the National Defense Authorization Act for Fiscal Year 2021 (FY21 NDAA) substantively amended 10 U.S.C. § 1251 to say officers who reach 62 years of age shall be retired or separated.

On 16 Feb 22, the Chief of the Air Force Military Force Policy Division (AF/A1PP) responded to her congressman she would not be eligible for retirement unless she reaches 20 years of service. This would require her to serve on active duty until 2032 and receive a Secretarial age waiver through age 70. If the Air Force refuses to honor the assurances it made when she commissioned, she will be forced to end her career with no benefits and will be too old to return to private practice. Worse yet, her husband, with prostate cancer, will be without health insurance.

The legal doctrine of promissory estoppel involves a promise which the promisor should reasonably expect to induce an action or forbearance on the part of the promisee of a third person and which does induce such action or forbearance. The promise is binding if an injustice can be avoided only by enforcement of the promise. The Air Force should not be allowed to repudiate its representations to her.

The requested relief is not unique. Counsel cites AFBCMR Docket Number BC-2020-02644 to warrant relief. While the change in statute in 2021 prevents any future accessions from being

incentivized to join based on the premise, those who were drawn to agree to serve by the incentive should be permitted to receive it.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a currently serving colonel (O-6) in the Air Force.

The applicant provides an email dated 11 Jun 12 from the Air Force Recruiting Service (AFRS) and AFPC Chief, Retirements and Separations Branch stating she would be eligible for a military retirement upon age 62 per 10 U.S.C. § 1251. Specifically, it states if the officer had 12 years of service, the retirement multiplier would be 2.5 percent, times the number of years, or about 30 percent against the retired pay base. Also, other retirement benefits such as Tri-Care and access to the base exchange and commissary would be awarded.

On 13 Jul 12, the applicant signed AFRS IMT 1430, *Statement of Understanding, Applicant for Extended Active Duty – USAF Health Professions*, and initialed Section X, *Retirement Ineligibility for all Healthcare Providers (MC, DC and NC Only)*, indicating she understood under current laws it would not be possible for her to complete sufficient active service to qualify for an active duty retirement and she agreed to enter extended active duty (EAD) under a specified period of time contract (SPTC). This would establish a date of separation (DOS) based on her entry date plus the amount of time indicated.

On 27 Aug 12, the applicant entered active duty in the grade of lieutenant colonel (O-5).

In a memorandum dated 26 Dec 19, OUSD P&R directed the services to immediately stop processing all pending retirement actions under 10 U.S.C. § 1251 for officers with less than 20 years of service, to not commence any such retirement actions in the future and to ensure potential officers are not recruited with assertions they may be eligible for a non-disability retirement with less than 20 years of service.

Counsel cites AFBCMR BC-2020-02644 as precedent to grant relief. The applicant in this case was part of a group request submitted on 10 May 20. The applicants were already retired under 10 U.S.C. § 1251 and collecting retired pay prior to the Department of Defense General Counsel (DoD/GC) legal opinion on 6 Nov 19, that any retirement of an officer with less than 20 years of active service approved under 10 U.S.C. § 1251 was erroneous. The applicant in the cited case retired effective 1 Apr 17 with 16 years and 6 days under 10 U.S.C. § 1251. On 17 Dec 20, the Board granted the request to show the applicant was eligible and properly retired under 10 U.S.C. § 1251 on 1 Apr 17.

On 16 Feb 22, AF/A1PP informed the applicant's congressman if the applicant desires to reach full retirement age, in order to reach the 20 years required, she will need to request deferment through age 70, pending Secretarial approval. The applicant was also informed her 16 years of service credit received was for the grade at the time she entered active duty and it did not count towards retirement/pay credit. Although she would not be eligible for retirement, she would be eligible for separation pay, should she opt to exit the service.

On 11 May 22, the Secretary of the Air Force Personnel Council (SAFPC) approved the applicant's 18 Mar 22 request for an age waiver through Feb 26. Her mandatory separation date (MSD) is 28 Feb 26.

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

APPLICABLE AUTHORITY/GUIDANCE

On 6 Nov 19, the Office of General Counsel provided the Director of Military Compensation with an interpretation of 10 U.S.C. § 1251 that the law did not allow retirement with less than 20 years of service. On 26 Dec 19, the OUSD P&R directed all services to immediately stop processing pending retirement actions under 10 U.S.C. § 1251 for officers with less than 20 years of service.

Public Law 116-283, FY2021 William M. (Mac) Thornberry National Defense Authorization Act (NDAA), 1 Jan 21, Section 507, Mandatory Retirement for Age. Notwithstanding paragraph (1), in the case of a regular commissioned officer who was added to the retired list before the date of the enactment of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, the officer shall be retired, with retired pay computed under section 1401, retirements under 10 U.S.C. § 1251, retired pay multiplier for years of service.

10 U.S.C. § 1251(a) General Rule. Unless retired or separated earlier, each regular commissioned officer of the Army, Navy, Air Force, Marine Corps or Space Force serving in a grade below brigadier general or rear admiral (lower half), shall be retired or separated, as specified in subsection (3), on the first day of the month following the month in which the officer becomes 62 years of age.

10 U.S.C. § 1251(e)(1)(A) If the officer has at least 6 but fewer than 20 years of creditable service, the officer shall be separated with separation pay.

Public Law 102-484, National Defense Authorization Act (NDAA) for FY93, provided the Secretary of Defense with a temporary additional force management tool to assist with the drawdown of active military forces. Subsection 4403(f) of the Act directed the use of a subaccount within the officer and enlisted budget activities of the Active Military Personnel Appropriation for retirement payments to members participating in the Temporary Early Retirement Authority (TERA) program. Public Law 112-81, National Defense Authorization Act for FY12 reinstated TERA through 31 Dec 18. Public Law 114-328, of the NDAA for FY17 extended this authority until 31 Dec 25.

AFI 36-3203, *Service Retirements*, paragraph 3.1, Retirement Eligibility. Unless granted a waiver under some provision of law, to be eligible for a non-disability active duty retirement, officers and enlisted members must complete 20 years total active federal military service. Likewise, an officer must have 10 years of total federal commissioned service (TFCS).

AFI 36-3203, *Service Retirements*, Table 5.1, Note 2, Under 10 U.S.C. § 1251, the SECAF may defer Regular medical officers, dental officers and nurses from retirement until age 68, if during the period of deferment, the officers perform duties necessary to meet the needs of the Air Force.

AIR FORCE EVALUATION

AF/AILO recommends denial. There is no evidence of an error or injustice. At the time the applicant entered the Air Force, she signed an AFRS 1430, which indicates her understanding she would not be able to reach 20 years of service for retirement. The applicant was given 16 years of constructive service credit allowing her accession at a higher grade, but that time does not count towards retirement credit. At her current date of separation, 28 Feb 26, she will have 13 years, 6 months and 3 days of service.

On 26 Dec 19, the Assistant Secretary of Defense for Manpower and Reserve Affairs, Performing the Duties of the Under Secretary of Defense for Personnel and Readiness, signed a memorandum halting all non-disability retirements without 20 years of service. The FY21 National Defense Authorization Act amended 10 U.S.C. § 1251 to clarify officers at age 62 must have 20 years of

creditable service in order to receive a retirement, unless the Secretary of the Air Force (SECAF) defers the officer's retirement allowing them to serve through age 68 or longer, if the SECAF determines such deferral is necessary for the needs of the military department. As noted, the law requires an officer must have 20 years of creditable service to qualify for retirement. While they are sympathetic to the inequities articulated by the applicant's counsel and concede the law changed after her appointment, she signed a statement acknowledging it would not be possible to complete sufficient active service to qualify for an active duty retirement. Although the applicant is not eligible for retirement when she reaches age 62, she will be eligible for separation pay should she opt to exit the service and she would receive Transitional Assistance Management Program (TAMP) benefits as a result. The applicant may also request a deferment until she qualifies for retirement which would require approval from the SECAF.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 1 Nov 23 for comment (Exhibit E) and the counsel responded on 29 Dec 23. Counsel states the advisory opinion acknowledges at least an injustice is present but makes no mention made by AFPC and the Air Force Recruiting Service (AFRS) when she inquired about her retirement eligibility in 2012 before she made the final decision to join the Air Force.

She took every effort of assuring she fully understood what her benefits and entitlements would be before joining the Air Force. She was informed she would be credited with the years of service necessary to allow her to receive a military retirement (even calculating it would be about 30 percent against the retired base pay), which included the health insurance she and her husband need because of his cancer diagnosis. The advisory opinion cites AFRS IMT 1430 containing a provision. She never took note of its existence as this was executed after she had been advised she would be eligible for retirement.

The circumstances demonstrate she is among a finite number of people who were eligible to receive a pro-rated retirement. This was one of the ways the Air Force chose to attract the expertise of medical professionals. The Board should grant relief due to the material errors committed by the AFPC Retirements and Accessions offices. There is no concern over establishing any precedent and the advisory opinion acknowledges the law changed after the applicant entered the Air Force.

The applicant's complete response is at Exhibit F.

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 AF/A1LO and finds a preponderance of the evidence does not substantiate the applicant's contentions. While the Board acknowledges the applicant was informed by AFPC and AFRS she would be eligible for retirement with less than 20 years of service, the applicant on 13 Jul 12 signed AFRS IMT 1430 prior to entering active duty acknowledging she understood she would not be able to complete sufficient service to qualify for retirement. Further, this Board, which serves on behalf of the SECAF in the correction of military records, is without authority to grant the applicant a service retirement upon age 62 with less than 20 years of service contrary to 10 U.S.C. § 1251. There is also no evidence

the applicant was eligible for or approved for retirement with less than 20 years of service under the Temporary Early Retirement Authority (TERA) or any other provision of law. Counsel argues the applicant is similarly situated to the applicant in BC-2020-02644 to warrant relief. However, the Board disagrees. While the applicant in the cited case was retired on 1 Apr 17 with less than 20 years of service under 10 U.S.C. § 1251, the retirement was approved prior to the OUSD P&R memorandum dated 26 Dec 19 and the FY21 NDAA. Moreover, the FY21 NDAA included a provision that those already retired and in receipt of retired pay shall be retired. The applicant in this case is not retired but is currently serving on active duty with a mandatory separation date (MSD) of 28 Feb 26. Accordingly, the Board does not find the applicant is similarly situated to the applicant in BC-2020-02644. 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-2022-03223 in Executive Session on 25 Aug 23 and 18 Jan 24:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 2 Dec 22.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: SAFPC Age Waiver (PB-2022-00224), dated 11 May 22.
Exhibit D: Advisory opinion, AF/A1LO, w/atchs, dated 22 Nov23.
Exhibit E: Notification of advisory opinion, SAF/MRBC, dated 1 Dec 23.
Exhibit F: Counsel's response, dated 29 Dec 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.