

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-00132

XXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

Amend her retired grade from captain (O-3) to major (O-4).

APPLICANT'S CONTENTIONS

When she applied for retirement, the Air Force Instruction stated a major must serve in that grade for a minimum of six months, and she made her decision based upon this information. In the meantime, federal law changed so that a major must serve in that grade for a minimum of three years. Additionally, there was no guidance or communication sent to the field when the change was made. She served over two years in the grade of major with a date of rank (DOR) of 14 Nov 19. Her retirement date was ¹31 Mar 22 [sic]. There was a legal review conducted and Regular Air Force pursued a waiver for their members who were affected by this change, and it was approved. The Air National Guard (ANG) did not pursue a waiver, but instead asked that the members affected by this change complete an Air Force Board for Correction of Military Records request to get their records accurately reflected.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air National Guard captain receiving retired pay.

On 20 Feb 20, according to Special Order Number XXXX, the applicant was extended federal recognition and promoted to the grade of major with a DOR of 14 Nov 19 and an effective date of 19 Feb 20.

On 4 Oct 21, Special Order Number XXXX was published, which ordered the applicant relieved from reserve assignment on 31 May 22 and retired on 1 Jun 22, in the grade of captain.

On 14 Oct 21, Reserve Order XXXX was published, which revoked Reserve Order² [sic] XXXX dated 4 Oct 21.

On 14 Oct 21, Reserve Order XXXX was published which ordered the applicant relieved from reserve assignment on 31 May 22 and retired on 1 Jun 22, in the grade of captain with highest grade on active duty of major.

On 6 Jan 22, Reserve Order XXXX was published, which revoked Reserve Order XXXX, dated 14 Oct 21.

¹ 1 Apr 22

² Special Order

On 31 Mar 22, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, the applicant was discharged in the rank/pay grade of major (O-4) for the purpose of retirement and was credited with 20 years, 2 months, and 24 days of active service. Her effective date of pay grade is 14 Nov 19.

On 31 Mar 22, according to Special Order XXXX, dated 14 Mar 22, the applicant was honorably discharged from the [State] Air National Guard and transferred to the USAF Retired List on 1 Apr 22.

On 31 Mar 22, according to Reserve Order XXXX, dated 9 Feb 22, the applicant was relieved from reserve assignment and retired on 1 Apr 22, in the grade of captain, with highest grade on active duty of major.

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

APPLICABLE AUTHORITY/GUIDANCE

Title 10 United States Code, Section 1370 (10 U.S.C. § 1370) – *Commissioned officers: general rule; exceptions*, (Prior to Fiscal Year 2021 National Defense Authorization Act (FY21 NDAA)):

(a) *Rule for Retirement in Highest Grade Held Satisfactorily.*

(1) Unless entitled to a different retired grade under some other provision of law, a commissioned officer (other than a commissioned warrant officer) of the Army, Navy, Air Force, or Marine Corps who retires under any provision of law other than chapter 61 or chapter 1223 of this title shall, subject to paragraph (2) and subsection (b), be retired in the highest grade in which he served on active duty satisfactorily, as determined by the Secretary of the military department concerned, for not less than six month.

10 U.S.C. § 1370 – *Regular commissioned officers*, (Post-FY21 NDAA):

(b) *Retirement of Officers Retiring Voluntarily.*

(1) *Service-in-Grade Requirement.* In order to be eligible for voluntary retirement under any provision of this titles in a grade above the grade 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 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 Secretary of Defense 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. § 1370a – *Officers entitled to retired pay for non-regular service*, (Post-FY21 NDAA):

(b) *Service-in-Grade Requirement for Officers in Grades Below O-5.* In order to be credited with satisfactory service in an officer grade (other than a warrant officer) below the grade of lieutenant colonel or commander (in the case of the Navy), a person covered by subsection (a) must have served satisfactorily in that grade (as determined by the Secretary of the military department concerned) as a reserve commissioned officer in an active status, or in a retired status on active duty, for not less than six months.

AIR FORCE EVALUATION

NGB/A1PP recommends denying the application. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice.

The Fiscal Year 2021 National Defense Authorization Act (FY21 NDAA) split 10 U.S.C. § 1370 into two separate laws, differentiating between regular and non-regular retirement. 10 U.S.C. § 1370 applies to officers entitled to retired pay for a regular retirement, whereas 10 U.S.C. § 1370a applies to officers entitled to retired pay for non-regular retirement. 10 U.S.C. § 1370 states that in order to be eligible for voluntary retirement, the commissioned officer must have served on active duty in that grade for a period of not less than three years. 10 U.S.C. § 1370a states that in order to be credited with satisfactory service in an officer grade below the grade of lieutenant colonel, a person must have served satisfactorily in that grade as a reserve commissioned officer in an active status, or a retired status on active duty, for not less than six months.

The applicant applied for retirement on 28 Jun 21. On 20 Sep 21, the Air Reserve Personnel Center (ARPC) notified the applicant since she applied for regular retirement, it would fall under 10 U.S.C. § 1370, which requires three years time-in-grade (TIG) to retire in the grade of major (O-4). On 21 Sep 21, the applicant acknowledged ARPC's response and indicated she was planning to pursue a TIG waiver. NGB/A1PP did not receive a TIG waiver from the applicant.

In Jan 22, her request to move her retirement date from 1 Jun 22 to 1 Apr 22, due to a pending religious accommodation request (RAR), was approved. By moving her retirement date, she was able to retire prior to being required to receive the COVID-19 vaccine, if her RAR was denied. Instead of submitting for retirement, she could have waited for the outcome of her RAR. If the RAR was denied, she could have submitted an appeal.

She retired on 1 Apr 22, with a regular retirement, with two years and four months³[sic] TIG as a major. Since she did not meet the minimum three-year TIG requirement for major, she was retired in the grade 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 12 Apr 23 for comment (Exhibit D), and the applicant replied on 10 May 23. In her response, the applicant contended any comments regarding her RAR should not be addressed or considered in this matter because it has absolutely no bearing on the outcome of this case. She reiterates her contentions from her original application. She further stated she feels there is a significant injustice in the differential treatment between active component and Active Guard Reserve.

The applicant provided copies of email threads between herself and NGB/A1P in support explaining how she was told to proceed. She also has been advised to consider filing a congressional inquiry to rectify this situation but would prefer not to go down that road as she has done exactly what has been asked of her in every situation and hopes to clear this issue without that next step.

³ The time between the applicant's 14 Nov 19 DOR and 31 Mar 22 date of separation is 2 years, 6 months, and 17 days.

If the Board is unable to correct her Defense Finance and Accounting Service record to accurately reflect the grade of major, she requests the Board consider the only other option addressed in paragraph 4 of the advisory which discussed the Proposed Directive Language referencing 10 U.S.C. § 1370(b)(A) reducing the required period to not less than two years. She served in the grade of major for over two years when the requirement was only six months. She joined the military at 17 years old and served her county honorably for over 26 years.

The applicant's complete response is at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION

NGB/A1PP recommends denying the application and amends the previous advisory to include the following: the Air Force pursued a blanket waiver and the applicant inquired with NGB/A1PP as to whether the ANG would pursue a blanket waiver. Based on the minimal number of ANG members impacted, the decision was made to not pursue a blanket waiver; however, the applicant was already retired at the time this decision was made.

The complete amended advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the amended advisory opinion to the applicant on 8 Sep 23 for comment (Exhibit G) 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. While the Board notes the recommendation of NGB/A1PP against correcting the record, the Board finds a preponderance of the evidence substantiates the applicant's contentions in part. At the time the applicant initially applied for retirement, she met the statutory time in grade requirement for retirement in the higher grade of major. The FY21 NDAA impacted several officers pending regular retirement under 10 U.S.C. § 1370, to include the applicant, with the Air Force granting a blanket waiver. A blanket waiver was not requested by the ANG for those members eligible for a regular retirement under 10 U.S.C. § 1370. The Board found that while not an error, the applicant's retirement in the lower grade of captain was an injustice as she met the same requirements as her Air Force counterparts granted the TIG waiver, and consequently, was treated differently than those similarly situated. Therefore, the Board recommends correcting the applicant's records as indicated.
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 on 1 Apr 22, she was retired under 10 U.S.C. § 1370 in the grade of major (O-4).

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-2023-00132 in Executive Session on 25 Oct 23:

, Panel Chair
, Panel Member
, Panel Member

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

- Exhibit A: Application, DD Form 149, dated 27 Dec 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, NGB/A1PP, w/atchs, dated 8 Mar 23.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 12 Apr 23.
- Exhibit E: Applicant's Response, w/atchs, dated 10 May 23.
- Exhibit F: Amended Advisory Opinion, NGB/A1PP, w/atchs, dated 7 Sep 23.
- Exhibit G: Notification of Amended Advisory, SAF/MRBC to Applicant, dated 8 Sep 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.

X

Board Operations Manager, AFBCMR