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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03489

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His remaining debt for recoupment of his voluntary separation incentive (VSI) pay be remitted.
2. In the alternative, the monthly recoupment amount from his retired pay be reduced from 40 percent to 20 percent.

APPLICANT'S CONTENTIONS

There was a failure to properly enforce requirements directed by the military personnel flight and Public Law 102-484, Sec 4406(a)(1). The provided letter and his DD Form 214, *Certificate of Release or Discharge from Active Duty*, indicate he was never told to contact the Defense Finance and Accounting Service (DFAS). He was retired for over two years before he was notified of any changes to his contract as required by public law. He had no knowledge of requirements governing the payback of his VSI. Had he been made aware; he would have addressed the issue to possibly reduce his debt by \$212,000.

He provides an email dated 15 Dec 22 from a retired Air Force master sergeant (E-7). The email states in Feb 94, the applicant joined the Reserve wing and in 2000 was assigned to his area to perform duty. The applicant repeatedly asked over several years when they were going to start recouping his pay to repay his VSI. Each time the question was asked, he would tell the applicant that it was a DFAS function and he did not control pay.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force lieutenant colonel (O-5).

The applicant entered a period of active duty service in the Regular Air Force on 4 Aug 83.

On 2 Jul 92, the applicant signed the Officer Voluntary Separation Incentive (VSI) Agreement for the amount of \$366,822.75. Item 2(f) states, "If by virtue of reserve service or otherwise, I later become eligible for retired or retainer pay based in part on active duty for which I received VSI, I will have an amount deducted from each payment of that retired or retainer pay until the amount deducted equals the total amount of VSI actually received."

On 29 Sep 92, the applicant was honorably discharged from active duty with a narrative reason for separation of "Voluntary Resignation, Other, for Early Release Program-Voluntary Separation

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Incentive.” He served 9 years, 1 month and 26 days of active duty for the period and 4 years, 7 months and 12 days of prior active service. The applicant served in the Air Force Reserve following his discharge from active duty.

On 1 Jun 11, he was placed on the Retired Reserve List in the grade of O-5, eligible for retired pay except attainment of eligibility age.

Per Reserve Order **Work-Product** dated 26 Nov 18, the applicant was placed on the Retired List in the grade of O-5, effective 22 Aug 18. The applicant’s service for basic pay reflects 39 years, 11 months and 14 days.

On 10 Jan 19, the DFAS advised the applicant they would start recoupment of his VSI in the amount of \$351,962.26 effective 1 May 19 per 10 U.S.C. § 1174(h)(1). DFAS would collect \$1,763.60 per month until the gross amount of the payment was recouped.

On 31 May 19, the Air Force Remissions Board (AFRB) denied the applicant’s request for remission of his debt for \$351,962.26. The AFRB found the collection of the debt did not create an injustice or inequitable situation and noted the applicant signed the VSI Agreement on 2 Jul 92, which placed him on notice that the VSI would be recouped if he later became eligible for retired pay. Further, federal law prohibited receiving both VSI and retired pay for the same period of service. The AFRB noted that DFAS would establish the monthly recoupment amount.

On 3 Jul 19, the applicant appealed the AFRB’s decision. On 10 Jul 19, DFAS denied the applicant’s appeal. The applicant contended the debt should be remitted because he was not informed he could have initiated a collection of his VSI while serving in the Air Force Reserve to lower the balance due after retirement. If the applicant had initiated a pay back of the debt during his Reserve time, the ending balance would have been less. However, if he had not attained retirement for some reason, the amount collected would not be returned. There was no proof of any conversations the applicant had when he entered the Air Force Reserve regarding his VSI. The facts include the applicant signed a VSI Agreement acknowledging he would have to repay his VSI if he became eligible for retired pay. He is now required to repay the VSI per federal law. Regardless of whether the applicant was given the option to start collection or not, the entire VSI would still need to be repaid. The DFAS also noted the applicant had not requested financial hardship consideration.

On 27 Sep 19, the Air Force Review Boards Agency Director reconsidered the decision to disapprove his request for remission of VSI in the amount of \$351,962.26. Upon reconsideration, it was determined there was no legal authority under 10 U.S.C. § 9837 to remit his obligation to repay the VSI pay he received. Because there is no authority to remit the VSI pay, no action was taken on his appeal.

On 22 Jan 21, the AFBCMR (BC-2020-01650) considered and denied the applicant’s request his debt for VSI be reduced from \$351,926.62 to \$139,649.69 or in the alternative, the monthly recoupment rate from retired pay deducted be reduced from 40 percent to 10 percent. The applicant contended the debt should be waived due to oversight issues and failure to execute the separation agreement. The applicant also contended Public Law 102-484 allowed an option for military members to participate in an offset whereby they could reduce the amount owed through an offset with earned pay. He provided an email dated 17 Jun 19 from AF/A1 stating the Air Force Reserve would have seen his DD Form 214 and receipt of VSI. If the Reserve failed to conduct due diligence by not reviewing the VSI and directing him to DFAS, it would have been a failure on their part. It may not dismiss the debt, but it might result in looking at a reduction or change to the repayment rate. The Board concluded the applicant signed the VSI Agreement on 2 Jul 92,

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which included the VSI would be recouped should he become eligible for retired pay. Further, 10 U.S.C. § 1174 required recoupment.

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

APPLICANT'S ADDITIONAL RESPONSE

The applicant provides a letter from the DFAS dated 7 Jun 23, which was not previously considered by the Board. In the letter, DFAS informed the applicant his request for additional retired pay and request to reduce the amount of his VSI recoupment was denied in full. They conducted a detailed evaluation of his case in conjunction with the DFAS Office of General Counsel. The DFAS letter includes a chronology of the applicant's requests and communication with the applicant, to include prior denials by the AFRB, DFAS and the AFBCMR. The applicant highlighted the paragraph indicating he believed the Department of Defense (DoD) had an obligation to reduce his VSI based on the language contained in the VSI agreement. It stated if a member's VSI agreement contained a clause contrary to the law, the statute will control. Thus, despite the language in his contract, there was no provision of law at the time which would have permitted the DoD to reduce his VSI unless he elected it. The applicant was advised he had a right to submit an appeal of the determination to the Defense Office of Hearing and Appeals (DOHA) within 30 days of the date of the letter.

APPLICABLE AUTHORITY/GUIDANCE

Per 10 U.S.C. § 1174(h)(1), A member who has received separation pay based on service in the Armed Forces, and who later qualifies for retired pay shall have deducted from each payment of such retired or retainer pay an amount as determined, taking into account the financial ability of the member to pay and avoiding the imposition of undue financial hardship, until the total amount deducted is equal to the total amount of separation pay so paid.

DoD 7000.14-R, *Financial Management Regulation*, Volume 7B, Chapter 4, paragraph 3.1.4., A member who received VSI pay on 15 Sep 81 or later, and who later qualifies for retired pay, must have the retired pay reduced until the recovery of the full amount.

Public Law 102-484, enacted on 23 Oct 92, 4406(a)(1) Recoupment of Active or Reserve Pay, amended 10 U.S.C. § 1175(e) to reflect "may elect to have a reduction in the VSI payable for the same period in an amount not to exceed the amount of the basic pay or compensation received for that period." Section 4406(a)(2), further states "If the member elected to have a reduction in VSI for any period pursuant to paragraph (2), the deduction required shall be reduced accordingly."

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 remains unconvinced the evidence presented demonstrates an error or injustice. The Board concurs with the prior decisions of the AFRB, DFAS and the AFBCMR and finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant contends the Air Force failed to tell him to contact DFAS to withhold his Reserve duty pay to reduce his VSI prior to his retirement per Public Law 102-484. In support of his contention, the applicant provides an email dated 15 Dec 22, which supports he asked his

Reserve unit about the recoupment of his VSI and that he was referred to the DFAS. However, the applicant provided no evidence he requested any election or made any financial arrangements with DFAS prior to his receipt of retired pay. While the applicant places the blame on the Air Force for not telling him to contact DFAS, the Board disagrees and finds his contention is without merit. Public Law 102-484 was not enacted until 23 Oct 92, one month prior to his discharge from active duty. Further, Public Law 102-484 states that a member may elect to have a reduction in the VSI payable but did not mandate an offset prior to receipt of retired pay. Since Reserve pay recouped to reduce VSI is not refunded should a member not later earn a military retirement, each member must make a personal decision that is in their best interest. The 15 Dec 22 email affirms the applicant was aware of the requirement for recoupment of his VSI upon eligibility for retired pay. The applicant also provides a letter from DFAS dated 7 Jun 23 in further support of his request. However, the Board finds the 7 Jun 23 DFAS letter further corroborates the recoupment for his VSI was established in accordance with 10 U.S.C. § 1174(h). In this respect, the applicant's retirement order placing him on the retired list was published on 26 Nov 18, for retirement effective 22 Aug 18. Then on 10 Jan 19, DFAS informed the applicant they would start recoupment of his VSI on 1 May 19. The applicant then appealed the decision to the AFRB, DFAS and the AFBCMR. The applicant is reminded he signed his VSI Agreement on 2 Jul 92, which placed him on notice his VSI would be recouped should he later qualify for receipt of retired pay. Nonetheless, this Board, which serves on behalf of the Secretary of the Air Force in the correction of military records, is without authority to waive the requirement for VSI recoupment upon receipt of retired pay contrary to law. With respect to the applicant's request the monthly recoupment amount from his retired pay for his VSI be reduced from 40 to 20 percent of his retired pay, the applicant has provided no evidence of any financial hardship to warrant relief. The Board recommends the applicant contact DFAS to determine if he is eligible for any reduction of the recoupment rate. 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-2023-03489 in Executive Session on 25 Jan 24 and 29 Aug 24:

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| <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 10 Oct 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Record of Proceedings (BC 2020-01650), w/Exhibits.
- Exhibit D: Applicant's additional response, DFAS letter, dated 7 Jun 23.

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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.

9/12/2024

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Board Operations Manager, AFBCMR
Signed by: USAF

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