



Work-Product

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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2024-03239

COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT’S REQUEST

He be given medical continuation (MEDCON) orders from 9 Jan 23 through 14 Mar 24.

APPLICANT’S CONTENTIONS

He was injured in the line of duty (ILOD) while on active-duty orders. Instead of remaining on MEDCON orders as he was being processed through the Disability Evaluation System (DES), he was involuntarily transferred to the Inactive Status List Reserve Section (ISLRS). 10 U.S.C. Section 1074a authorizes Reserve Component (RC) members to receive medical and dental care for ILOD conditions until the condition cannot be materially improved by further treatment and 10 U.S.C. Section 12322 authorizes active-duty orders for this purpose. Per DoDI 1241.01, *Reserve Component Line of Duty Determination for Medical and Dental Treatments and Incapacitation Pay Entitlements*, and DoDI 1332.18, *Disability Evaluation System*, members that may be rendered unfit under the DES, will be retained on active duty orders (MEDCON under DAFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON) and Incapacitation (INCAP) Pay*) until the condition is revolved or their DES case has been completed (final deposition).

It is undisputed, he incurred unfit medical conditions while on active duty and applicable guidance authorized him to remain on active-duty orders via MEDCON orders. The National Guard Bureau (NGB) failed to afford him due process rights when he was removed from his state position. This failure was in violation of 10 U.S.C. Section 14314, DAFI 36-2910 and ANGI 36-2501, *Officer Promotions and Selective Continuation*, when NGB failed to properly notify him of his options upon removal from his state status on 11 Nov 22. The 9 Jan 23 exception to policy (ETP) memorandum involuntarily transferred him to the ISLRS without appropriately delegated authority. The right to separate a general officer for physical disability is reserved for the Secretary of the Air Force (SAF) and is not delegated; hence, the involuntary transfer to the ISLRS is unenforceable. Furthermore, he was not notified or given the opportunity to present his case to a Board of Inquiry prior to the involuntary transfer.

After he accepted the Physical Evaluation Board’s decision, his case was routed for final review to SAF/PC. However, SAF/PC incorrectly processed his case under DoDI 1332.18 which requires

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CUI Categories: Work-Product
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POC: SAF.MRBC.Workflow@us.af.mil

a final decision by the Under Secretary of Defense (USD) for general officers retiring for age or length of service in addition to a medical retirement and as an officer grade determination without proper due process. He did not voluntarily retire nor was he being retired for age or length of service, hence, the needless processing of his DES case (an extra nine months) to the USD. Had his termination from his state position and his DES case been handled properly, he would have remained on MEDCON orders through the completion of the SAF/PC review and determination of the SAF and he would have remained eligible for TRICARE coverage instead of racking up medical bills which should have been paid for by the Air Force. He goes on to cite several cases which have similar positive outcomes and relate to his situation.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a medically retired Air National Guard (ANG) brigadier general (O-7).

Dated 10 Nov 22, a memorandum from the applicant's state indicated he would be transferred to the retired Reserve, effective 9 Jan 23 per **Work-Product** Military and Veterans Code Section 239.

Dated 1 Dec 22, Order Number **Work-Product** indicates the applicant was on MEDCON orders from 16 Nov 22 through 8 Jan 23.

On 28 Dec 22, AF Form 356, *Informal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to his medical conditions of lumbar and cervical spondylosis and left and right, upper and lower extremity radiculopathy with an overall disability compensation rating of 60 percent with a recommendation of "Permanent Retirement."

On 29 Dec 22, AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, indicates the applicant agreed with the findings and recommended disposition of the Informal Physical Evaluation Board (IPEB) and waived his rights to any further appeal. On this same day, his state provided an election memorandum under the provisions of 10 U.S.C. Section 14314(a) asking the applicant to make a selection by 2 Jan 23 and if no election was made, he would be transferred to the ISLRS.

On 31 Dec 22, his state provided another memorandum regarding the election memorandum previously sent indicating there was no known authority to mandate an election on the applicant's behalf and advised the applicant to engage with his counsel to make an appropriate selection based on the IPEB recommendation.

On 9 Jan 23, the Principle Deputy Assistant Secretary (Manpower and Reserve Affairs) signed an ETP memorandum transferring the applicant to the ISLRS per 10 U.S.C. Section 14314 which mandated discharge or transfer and per 10 U.S.C. Section 14519 which precluded medical deferment of such action. It is noted, due to the decision of his state to unassign him from his

ANG position on 10 Dec 22 and the election of the applicant to not make a decision regarding his separation, it was directed he be transferred to the ISLRS while pending his disability determination.

Dated 19 Jan 23, Special Order **Work-Product** indicates the applicant was honorably discharged from the ANG, effective 8 Jan 23.

On 9 Feb 24, the Acting USD approved the applicant for a medical disability retirement.

Dated 28 Feb 24, Special Order **Work-Product** indicates the applicant was permanently disability retired in the grade of brigadier general with a compensable percentage for physical disability of 60 percent, effective 15 Mar 24.

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

APPLICABLE AUTHORITY/GUIDANCE

10 U.S.C. Section 14314, *Army and Air Force commissioned officers: generals ceasing to occupy positions commensurate with grade; State adjutants general.*

(a) *General Officers*, except as provided in paragraph (2), within 30 days after a reserve officer of the Army or the Air Force on the reserve active-status list in a general officer grade ceases to occupy a position commensurate with that grade (or commensurate with a higher grade), the Secretary concerned shall transfer or discharge the officer in accordance with whichever of the following the officer elects: (A) Transfer the officer in grade to the Retired Reserve, if the officer is qualified and applies for the transfer. (B) Transfer the officer in grade to the inactive status list of the Standby Reserve, if the officer is qualified. (C) Discharge the officer from the officer's reserve appointment and, if the officer is qualified and applies therefore, appoint the officer in the reserve grade held by the officer as a reserve officer before the officer's appointment in a general officer grade. (D) Discharge the officer from the officer's reserve appointment.

(b) *Adjutants General*, if a reserve officer who is federally recognized in the Army National Guard or the Air National Guard solely because of the officer's appointment as adjutant general or assistant adjutant general of a State ceases to occupy that position, the Secretary concerned, not later than 30 days after the date on which the officer ceases to occupy that position, shall withdraw that officer's Federal recognition; and require that the officer be transferred in grade to the Retired Reserve, if the officer is qualified and applies for the transfer; be discharged from the officer's reserve appointment and appointed in the reserve grade held by the officer as a reserve officer immediately before the appointment of that officer as adjutant general or assistant adjutant general, if the officer is qualified and applies for that appointment; or be discharged from the officer's reserve appointment.

Per DoDI 1332.18, paragraph 1.2.k, RC Service members on active duty orders specifying a period of more than 30 days, who incur a potentially unfitting condition during that time will, with their consent, be kept on active duty for disability evaluation processing until final disposition by the Secretary of the Military Department concerned. In accordance with DoDI 1241.01, *Reserve Component Line of Duty Determination for Medical and Dental Treatments and Incapacitation Pay Entitlements*, RC Service members may elect to be released from active duty before completing DES processing. If the RC Service member elects to be released from active duty before completing DES processing: (1) The Secretary of the Military Department concerned will assign responsibility for completing the resolution of the condition(s) or completion of the DES to the Service member's appropriate command. (2) The Secretary concerned will provide a LOD determination to document the Service member's entitlement to medical and dental treatment comparable to that in Section 1074a of Title 10, U.S.C.

Per DAFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*, paragraph 6.4, *Control of the Service Member After PEB Action*, the Force Support Squadron (FSS) must not retire, discharge, nor release a service member from active duty before receiving the final decision in the form of either retirement orders, separation instructions or a return to duty notification from AFPC/DPFDD.

AIR FORCE EVALUATION

AFPC/DPFA (ARC CMD) reviewed the applicant's petition and records and opines he did not meet MEDCON eligibility criteria once he was placed on the ISLRS on 9 Jan 23. However, should this action be considered an error or injustice, then the applicant would have met all MEDCON eligibility requirements from 9 Jan 23 through 7 Jun 23. Beyond 7 Jun 23, the applicant's acknowledgement of civilian employment would have precluded his further participation in the MEDCON program. Since the decision to curtail the applicant's MEDCON orders was the direct result of a SAF/MR memorandum dated 9 Jan 23, a specific advisory should be obtained from that office.

The applicant met all eligibility requirements while on approved MEDCON orders from 16 Nov 22 through 8 Jan 23; however, his orders were curtailed based on an Assistant Secretary, Manpower and Reserve Affairs (SAF/MR) Memorandum for Director, ANG directing his transfer into the ISLRS due to the decision of the Adjutant General of the **Work-Product** National Guard **Work-Product** TAG) to unassign the applicant from his position in the ANG on 10 Dec 22 and the decision of the applicant to not make an election under 10 U.S.C. Section 14314(a). Members assigned to ISLRS are not eligible to be activated or mobilized on orders and therefore the applicant could no longer remain on MEDCON orders.

The complete advisory opinion is at Exhibit C.

NGB/Legal recommends denying the application. The actions of the applicant's guard unit involving removal of the subject officer from a state Assistant Adjutant General position triggered

the implementation of 10 U.S.C. 14314(b) and AFI 36-2504, *Officer Promotion, Continuation, and Selective Early Removal in the Reserve of the Air Force*, paragraph 21.9.3.2 (formerly ANGI 36-2501, Section 4.1). The law states if a reserve officer who is federally recognized in the Army National Guard or the ANG solely because of the officer's appointment as adjutant general or assistant adjutant general of a State ceases to occupy that position, the Secretary concerned, not later than 30 days after the date on which the officer ceases to occupy that position, shall withdraw that officer's Federal recognition; and require that the officer be transferred in grade to the Retired Reserve, if the officer is qualified and applies for the transfer; be discharged from the officer's reserve appointment and appointed in the reserve grade held by the officer as a reserve officer immediately before the appointment of that officer as adjutant general or assistant adjutant general, if the officer is qualified and applies for that appointment; or be discharged from the officer's reserve appointment. Accordingly, as the Acting **Work-Product** TAG removed the applicant from his ATAG position on 10 Dec 22, to comply with 10 U.S.C. 14314(b) and AFI 36-2504 (formerly ANGI 36-2501), **Work-Product** was required to effectuate the applicant's transfer to the Retired Reserve (or to ISLRS) within 30 days (9 January 2023). There is no federal authority available (to include the AFBCMR) to countermand the Governor's assignment decision or otherwise be directed by Air Force authorities that the officer be retained in the **Work-Product** on MEDCON in violation of 10 U.S.C. 14314(b).

The applicant failed to make an election per 10 U.S.C. 14314(a) to either transfer in grade to the Retired Reserve or transfer in grade to the Inactive Status List of the Standby Reserve. Thus, again to effectuate the statutory requirements of 10 U.S.C. 14314(b), the National Guard Bureau (NGB), on behalf of **Work-Product** TAG, staffed a request to SAF/MR to approve the transfer of the applicant to the ISLRS. In staffing the request, NGB also noted per 10 U.S.C. 12214, the Secretary also had the authority to transfer the applicant in grade to the Air Force Reserve.

NGB/Legal defers to SAF/MR and SAF/GC on subsequent actions taken upon receipt of the above-referenced staffing request from NGB.

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 10 Jul 25 for comment (Exhibit E) and the applicant replied on 8 Aug 25. In his response, the applicant contends, through counsel, he was not involuntarily transferred into the ISLRS under 10 U.S.C. Section 14314(b) but was transferred under 10 U.S.C. Section 14314(a). Subparagraph (b) only applies to individuals who have federal recognition solely based on the appointment to TAG or ATAG. Although he was in an ATAG position, he also had a general officer (GO) line promotion, so paragraph (b) does not apply. Removal under paragraph (a) requires an election by the member. He maintained his federal recognition as a GO since a withdrawal was never initiated. Additionally, he was not given the required 90 days to complete the necessary documents before his involuntary transfer nor did he waive this requirement. The SAF never took action to transfer him to the ISLRS, that was done by SAF/MR who did not have the authority to do so. He did not fail to make an election per 10

U.S.C. Section 14314(a) but deliberately chose to decline to make an election to preserve his rights within the DES and had he made this election, that could have, and likely would have, resulted in a waiver of his right to continue DES processing. Furthermore, the advisory opinion references a package was staffed to SAF regarding his separation and transfer to the ISLRS; however, this evidence was not provided which is required by law, 10 U.S.C. Section 1556. The legal advisory opinion also lacks recommended corrective action should the board grant.

The advisory opinion from ARC CMD denies MEDCON because he had civilian employment; however, DAFI 36-2910, paragraph 6.2. establishes the eligibility criteria for MEDCON and does not state anything with regard to civilian employment. The Federal Courts have been clear that any civilian earnings during a time of constructive service should be considered and offset during the calculations of pecuniary benefits to be awarded after a BCMR order of constructive service. Had SAF/MR not unlawfully transferred him to the ISLRS, he would have remained on MEDCON orders and would not have had to obtain gainful civilian employment.

He amends his request stating the following: should the AFBCMR grant the complete relief requested, MEDCON orders from 9 Jan 23 through 14 Mar 24, instruct DFAS to ensure proper calculation of pecuniary benefits in the right sequenced order. The Court of Federal Claims set forth the appropriate sequencing in *Laningham v. United States*, 5 Cl. Ct. 146, 158 (1984), that requires the deduction of corresponding civilian earnings and any debt owed to the DVA from the gross DoD pecuniary benefits owed to the member. Furthermore, the deduction of civilian earnings against gross pecuniary benefits owed should only be assessed against the time period relevant to the civilian employment with pay calculations being broken down month by month with the civilian offset only offset against the gross DoD earnings from 8 Jun 23 through 14 Mar 24.

The applicant's complete response is at Exhibit F.

FINDINGS AND CONCLUSION

1. The application was timely filed.
2. The applicant exhausted all other available administrative remedies 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 recommendations of NGB/Legal and AFPC/DPFA and finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant was removed from his position by the Acting TAG by order of the Office of the **Work-Product** Governor. This action is in accordance with the powers granted to the States in the Constitution which terminated the applicant's affiliation with the **Work...** ANG. The Board has no authority to overturn the state's decision that removed the applicant from his appointed position as assistant adjutant general. Therefore, the Board finds, even though the applicant was eligible for MEDCON orders from a medical perspective, because he was removed

from his ANG position, he was no longer eligible to remain on active duty orders. He was correctly assigned to the ISLRS under the authority of the SAF per 10 U.S.C. 14314(a) as evidenced in the SAF/MR ETP memorandum. This office acted with full authority from the SAF. The law requires transfer or discharge within 30 days after a reserve officer of the Army or the Air Force on the reserve active-status list in a general officer grade ceases to occupy a position commensurate with that grade. This requires an election by the officer but the applicant made no such election fearing it would negate his DES processing; therefore SAF/MR made the decision for him to comply with the 30-days mandated by law. The applicant’s counsel argues he was not given the 90 days to complete the necessary documents before his involuntary transfer; however, the 30-day requirement by law overrides this requirement. Furthermore, the Board finds his transfer to the ISLRS in no way hampered the DES process and his subsequent medical retirement. The SAF had the right to request USD approval for the medical retirement but has no authority over the length of time for such a request to be approved. 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-2024-03239 in Executive Session on 18 Jun 25 and 26 Sep 25:

Work-Product	Panel Chair
Work-Product	Panel Member
Work-Product	Panel Member
Work-Product	Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 8 Sep 24.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPFA (ARC CMD), dated 22 Jan 25.
- Exhibit D: Advisory Opinion, NGB/Legal, dated 17 Jun 25.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 10 Jul 25.
- Exhibit F: Applicant’s Response, w/atch, dated 8 Aug 25.

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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.

11/12/2025

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Board Operations Manager, AFBCMR
Signed by: USAF

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