



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

Office of the Assistant Secretary

AFBCMR 97-00392

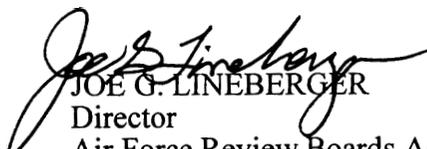
FEB 05 1999

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Air Force Board for Correction of Military Records and under the authority of Section 1552, Title 10, United States Code (70A Stat 116), it is directed that:

The pertinent military records of the Department of the Air Force relating to [REDACTED], be corrected to show that:

- a. On 9 April 1996, his enlistment for four years, executed on 10 June 1991 and extended for ten months on 8 May 1995, was extended through 30 January 1998, under the provisions of AFI 36-2606, Table 4.1, Rule 22.
- b. He was not released from active duty on 31 January 1998 due to high year of tenure, but on that date, as an exception to policy, competent authority approved the extension of his 10 June 1991 enlistment through 9 June 1999, and he continued on active duty and was ordered permanent change of station to his home of record (home of selection).
- c. He be given the opportunity to test for promotion to the grade of staff sergeant for cycle 98E5.
- d. On 31 January 1998, he applied for remission of any indebtedness that may have been incurred as a result of overpayment of refunded forfeitures and his application was approved by competent authority.


JOE G. LINEBERGER
Director
Air Force Review Boards Agency

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 97-00392

COUNSEL: None

HEARING DESIRED: No

FEB 05 1999

APPLICANT REQUESTS THAT:

1. He be allowed to reenlist retroactively to 9 April 1996 when his pay stopped, and that his family receive the pay allotted to them while he was in confinement, i.e., \$1,000.00 per month of waived forfeitures pursuant to the order approving his court-martial (CM) conviction.
2. His high year tenure (HYT) date of separation (DOS) be extended so that he can be eligible to test for **staff** sergeant.

APPLICANT CONTENDS THAT:

The reasons the applicant believes the records to be in error or unjust and the evidence submitted in support of the appeal are at Exhibit A.

STATEMENT OF FACTS:

As a result of his reduction from staff sergeant to a senior airman, and upon his completion of the Return to Duty Program (RTDP), he was honorably released from active duty due to HYT on 31 January 1998 and transferred to the Reserves. He was issued a separation program designator code of "LCC" (*Reduction in force with separation pay*), and a reenlistment eligibility code of "4D" (*SRA/Sgt with at least 9, but less than 16, years of total Air Force military service and not selected for SSgt*).

The remaining relevant facts pertaining to this application, extracted from the applicant's military records, are contained in the letters prepared by the appropriate office of the Air Force. Accordingly, there is no need to recite these facts in this Record of Proceedings.

AIR FORCE EVALUATION:

The Office of Personnel Program Management, HQ AFPC/DPPAES reviewed this appeal and states that applicant should have been extended from 9 April 1996 to 30 January 1998. DPPAES recommends the applicant be extended for this period so that he would have status and be allowed to remain on active duty until 17 January 1998 when his Bad Conduct Discharge (BCD) will be remitted.

A complete copy of the Air Force evaluation is at Exhibit C.

The Staff Judge Advocate, HQ AFPC/JA also reviewed the case and provides a chronology of events pertinent to this appeal. The JA contends the applicant should have been involuntarily extended beginning 9 April 1996, when he reached the DOS of his extended term of enlistment, until the resolution of his criminal trial. This was not done. Under the statutory rules governing CM sentences that were in effect at the time of his trial, applicant would have automatically been reduced to the grade of E-3 and would have begun forfeiture of all his pay and allowances on 7 June 1996. On 11 July 1996, CM Order No. [REDACTED] directed that \$1000.00 pay per month of the required forfeiture of total pay and allowances was to be waived for the duration of applicant's confinement and was to be paid to benefit his wife. The CM order reinstated the applicant to pay status, at least as to \$1000.00 per month of his pay during confinement, with an effective date of rank (DOR) as an E-4 of 11 July 1996. His DOS should have been extended to his maximum release date (MRD) of 9 October 1996 to effectuate this reinstatement. The convening authority did not approve retroactive pay or grade; therefore, total forfeiture and reduction to E-3 is appropriate from 7 June to 11 July 1996. On 9 October 1996, the applicant enrolled in the Return to Duty Program (RTDP) and the statutory automatic forfeiture provisions ended. Thus, he was once again entitled to full pay and appropriate allowances. It was an error not to offer him the opportunity to voluntarily extend his enlistment to complete the RTDP. Since applicant was ineligible for promotion while a prisoner and is currently ineligible for promotion until the suspended BCD has been remitted, his HYT date will be 30 days after completion of the suspended CM punishment. AFPC/JA believes that strict application of HYT to this applicant would create an injustice. The author recommends that the Board deny the applicant's request for retroactive reenlistment. Instead, he should be extended beginning 10 April 1996 and ending on 30 January 1998, compensated as discussed in the advisory opinion (with no pay for the period 7 June to 11 July 1996), and allowed to extend for one promotion cycle beyond his projected HYT date.

A complete copy of the Air Force evaluation, with attachments, is at Exhibit D.

The Chief, Inquiries/AFBCMR Section, HQ AFPC/DPPPWB, also reviewed the application and advised that the next promotion cycle to staff sergeant following completion of the suspended BCD

on 17 January 1998 is cycle 9835. To be eligible for consideration for this cycle, applicant must have a DOS of 1 September 1998 or later. If the DOS is extended, the discharge has been remitted, he is recommended by the commander, and there are no other disqualifying factors, he would be eligible for consideration. The Chief defers to the decision of the Board.

A complete copy of the Air Force evaluation, with attachments, is at Exhibit E.

The Chief, Claims Branch, DFAS-DE/FYCC, advised that the applicant entered a no-pay status on 10 October 1996 when his enlistment expired. He was restored to a full-duty status effective 1 December 1996. His pay record was adjusted in April 1997 retroactive to 2 December 1996. He has received all money due from the date of confinement, 23 May 1996, through when his enlistment expired, 9 October 1996. He also received all money due from the date he was restored to active duty, 2 December 1996, through present. He received no pay and allowances for the period 10 October through 1 December 1996.

A complete copy of the Air Force evaluation is at Exhibit F.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant reviewed the Air Force evaluations and requests that he be allowed to extend his DOS for one year so that he can test once more.

Applicant's complete response, with attachment (EPR), is at Exhibit H.

ADDITIONAL AIR FORCE EVALUATIONS:

In Executive Session on 2 December 1997, questions regarding the accuracy of applicant's pay status as discussed in the HQ AFPC/JA advisory (Ex. D) prompted the Board to defer rendering a final decision on this appeal. It was determined that further legal and payroll review was necessary to clarify applicant's status and entitlements. As a result, the following additional advisory opinions were obtained:

The Chief, Military Justice Division, AFLSA/JAJM, provided an additional advisory, which differs somewhat from the recommendation of HQ AFPC/JA. The applicant requests reenlistment retroactively to the end of his last enlistment (9 Apr 96), payment to his wife of \$1000 per month during his six months' confinement, and that his DOS be extended so he could test for staff sergeant. The Chief agrees the applicant's enlistment, which expired 9 April 1996, should have been extended until completion of the CM action, i.e., 9 June 1996. On that date, his

enlistment should have expired and, because he was in confinement at the time, he was ineligible to reenlist. If in confinement serving a CM sentence when enlistment expires, a member's pay and allowances will end on the date the enlistment expires unless the sentence is completely overturned or set aside. The Chief states, in contrast to the AFPC/JA advisory, that the convening authority had no authority to reinstate applicant to a pay status when acting on a CM sentence nor to extend the applicant's reenlistment beyond 9 June 1996. The family should be paid **at** the rate of \$1,000 pay per month from the date applicant entered confinement [23 May 96] until 9 June 1996, but not for the remainder of his confinement.

A copy of the complete additional evaluation is at Exhibit I.

The Chief, Claims Branch, DFAS-DE/FYCC, provided additional comments, indicating what applicant was/was not paid during the period in question. [*The Chief informally advised the AFBCMR Staff that the applicant ultimately received back pay/allowances due him, including the money that would have been sent to his wife. Also, it is DFAS' informal opinion that the applicant is actually indebted as the result of a possible over-refund of approximately \$302.21.*]

A copy of the complete additional evaluation, with attachments, is at Exhibit J.

APPLICANT'S REVIEW OF THE ADDITIONAL AIR FORCE EVALUATIONS:

Complete copies of the additional evaluations were forwarded to the applicant on 20 July 1998 for review and comment within 30 days. As of this date, no response has been received by this office.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice to warrant granting partial relief. After thoroughly reviewing the evidence of record, the applicant's submission, and the advisory opinions from DFAS-DE/FYCC, it appears he ultimately received all monies due him and that no further pay is necessary. We note the legal advisory opinions assert the applicant's 10 June 1991 reenlistment, which had been extended for 10 months on 8 May 1995, should have been further extended past the 9 April 1996 DOS until 9 June 1996, when his criminal trial was resolved. Further,

according to AFPC, in order to carry him in the appropriate active duty status to his DOS of 31 January 1998, he should have had his enlistment extended to include 17 January 1998 (when his suspended Bad Conduct Discharge was remitted) and 30 January 1998 (the date of his established HYT as a senior airman). We were also informally advised by **DFAS** that the applicant may have incurred a debt as a result of possible overpayment of !refunded forfeitures. We believe that, in light **of** his having completed the very difficult RTDP and attained an honorable discharge, any recoupment action for a possible debt of this nature should be remitted on the basis of clemency. Additionally, while the applicant requests retroactive reenlistment, we believe his original enlistment should **be** extended **for** the maximum period of 48 months so as to place him in the proper status under the provisions of AFI 36-2606, Table 4.1, Rule 22, and to allow him time and eligibility to test for promotion consideration **to** the grade of staff sergeant for cycle 98E5. If he is selected for promotion, he may then seek reenlistment if he wishes and his commander recommends him. Therefore, we conclude his records should be corrected as indicated below.

THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department **of** the Air Force relating to APPLICANT, be corrected to show that:

a. On 9 April 1996, his enlistment for four years, executed on 10 June 1991 and extended for ten months on 8 May 1995, was extended through 30 January 1998, under the provisions of AFI 36-2606, Table 4.1, Rule 22.

b. He was not released from active duty on 31 January 1998 due to high year of tenure, but on that date, as an exception to policy, competent authority approved the extension of his 10 June 1991 enlistment through 9 June 1999, and he continued on active duty and was ordered permanent change of station **to** his home of record (home of selection).

c. He be given the opportunity to test for promotion to the grade of staff sergeant **for** cycle 9835.

d. On 31 January 1998, he applied for remission of any indebtedness that may have been incurred as a result of overpayment of refunded forfeitures and his application was approved by competent authority.

The case **was** originally considered in Executive Session on 2 December 1997, then again on 22 October 1998, and finally on 7 January 1999 by the following members of the Board under the provisions of AFI 36-2603:

Mr. Thomas S. Markiewicz, Panel Chairman
Ms. Rita J. Maldonado, Member
Ms. Peggy E. Gordon, Member

All members voted to correct the records, as recommended. The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 28 Jan 97, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, HQ AFPC/DPPAES, dated 31 Mar 97.
- Exhibit D. Letter, HQ AFPC/JA, dated 13 May 97, w/atchs.
- Exhibit E. Letter, HQ AFPC/DPPPWB, dated 19 May 97, w/atchs.
- Exhibit F. Letter, DFAS-DE/FYCC, dated 16 Jul 97.
- Exhibit G. Letter, AFBCMR, dated 11 Aug 97.
- Exhibit H. Letter, Applicant 10 Nov 97, w/atch.
- Exhibit I. Letter, AFLSA/JAJM, dated 11 Feb 98.
- Exhibit J. Letter, DFAS-DE/FYCC, dated 30 Jun 98, w/atchs.
- Exhibit K. Letter, AFBCMR, 20 Jul 98.


THOMAS S. MARKIEWICZ
Panel Chairman