

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 97-01988

COUNSEL: NONE

FEB 05 1999

HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

He receive Nurse Anesthetist Incentive Special Pay of \$13,849.20.

APPLICANT CONTENDS THAT:

His ineligibility to apply for and collect nurse anesthetist specialty pay due to lack of proper and appropriate counseling.

In support of his appeal, the applicant provided a personal statement, a copy of his Nurse Anesthetist Pay Agreement, a message regarding Incentive Special Pay (ISP) for Certified Registered Nurse Anesthetists (CRNAs), and other documents associated with the matter under review.

Applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS:

Applicant was relieved from active duty on 31 Oct 97 and retired, effective 1 Nov 97, in the grade of major. He was credited with 20 years and 21 days of active duty service.

The relevant facts pertaining to this application are contained in the letters prepared by the appropriate offices of the Air Force. Accordingly, there is no need to recite these facts in this Record of Proceedings.

AIR FORCE EVALUATION:

The Special Pay Branch, AFPC/DPAMF1, reviewed this application and indicated that the applicant was given the opportunity to renegotiate his Nurse Anesthetist Incentive Special Pay in 1995 due to an increase in the entitlement from \$6000.00 to

\$15,000.00. The applicant did not take the opportunity to change his effective date at this time and kept his effective date of 29 Nov.

According to DPAMF1, they received a Nurse Anesthetist Pay Agreement from the applicant with an effective date of 2 Nov 96.

At that time, he had a date of separation (DOS) of 31⁹ Oct 97. They contacted the Nurse Utilization Branch requesting that the applicant's DOS be extended to 28 Nov 97 to match the active duty service commitment for the pay. The Nurse Utilization Branch informed DPAMF1 that the applicant had a mandatory separation date of 31 Oct 97 due to his promotion pass-over status.

DPAMF1 stated that, on 23 Oct 96, they returned the contract to the Military Personnel Flight, Lackland AFB, explaining their inability to process the contract due to the applicant's lack of retainability. USC Title 37 does not allow for prorated distribution of special pay. Members must have 12 months retainability to receive Nurse Anesthetist Incentive Special Pay.

DPAMF1 indicated that received a memorandum, dated 7 Nov 96, from [REDACTED] Chief Nurse Anesthetist, [REDACTED] requesting a waiver for the applicant to receive Incentive Special Pay. The memorandum was forwarded to HQ

USAF/SGW for consideration. HQ USAF/SGW Memorandum, dated 17 Dec 96, stated "a waiver is not possible to award less than one year's prorated amount of this special pay."

According to DPAMF1, they were unable to pay the applicant a prorated special pay for the last 11 months of his active duty service due to USC Title 37. His failure to renegotiate his agreement in 1995 led to his ineligibility to collect special pay. The applicant believes he did not receive adequate counseling in 1995. DPAMF1 recommended approval of the applicant's request due to his not fully understanding the renegotiation process offered in 1995.

A complete copy of the DPAMF1 evaluation is at Exhibit C.

Pursuant to the Board's request, DPAMF1 provided an advisory on the most appropriate way to correct the record, since the specific relief sought by the applicant is prohibited by law. According to DPAMF1, the applicant selected Option One on 10 Feb 95, requesting that he keep his anniversary date of 29 Nov. A \$6,000 payment had been authorized on 29 Nov 94, so the additional \$9,000 payment was authorized by the Accounting and Finance Center on 12 Mar 95. He received the full \$15,000 CRNA ISP payment on 29 Nov 95. Information provided to the applicant was no different from that provided to similarly situated officers when he was offered the four options concerning his ISP. DPAMF1 stated that, if approved, and the applicant is allowed to select Option 4, his anniversary date would be changed retroactive to 31 Oct 94 and his pay prorated. His 29 Nov 95

contract date would be changed to 31 Oct 95, and his final contract would be effective 31 Oct 96 and he would be eligible to receive his special pay bonus for his final 12 months of active duty. **DPAMF1** recommended approval based on the fact that the applicant felt he did not receive adequate counseling in 1995 before selecting Option One.

A complete copy of the DPAMF1 evaluation is at Exhibit D.

The Staff Judge Advocate, AFPC/JA, reviewed this application and recommended denial. In JA's opinion, the applicant's case is without merit and should be denied. He has not proved an "error or injustice" and, consequently, is not entitled to relief. To claim, as he does, that the message failed to give "some explanation as to why the Air Force was allowing change of the anniversary date," is simply wrong. Within the message is notice that the ISP entitlement increased in the recently-enacted National Defense Authorization Act from \$6,000 to \$15,000 per year, effective 5 Oct 94. The obvious purpose of the 4 Jan 95 message was to inform CRNAs of the increased ISP entitlement and permit them to make decisions that best suited them insofar as taking advantage of the increase. The best option for maximizing ISP would have been to renegotiate from 29 Nov to 5 Oct because the rate of daily ISP would be greater for the intervening 55 days. However, because the message was not sent out until the new tax year and, consequently, the newly renegotiated lump sum ISP would not be received until 1995, a renegotiation to another date in 1994 (i.e., 5 Oct to 31 Dec 94) would result in two ISP payments in 1995 (e.g., the 5 Oct 94 and 5 Oct 95 payments) and increased taxes. No doubt the tax consequences of renegotiation led some not to renegotiate; whether that was the applicant's reason is unknown. But the point is this: The message was not designed to address the long-term consequences of changing anniversary dates, which would vary from individual to individual. The applicant has not pointed to anything in the message that was in error; nor are we aware of any error therein.

JA indicated that, at best, the applicant would have the Board believe the failure to include in the message information about him needing to have one year of retainability at the time of his last ISP anniversary date was an injustice. Simply put, the action by the Air Force does not shock the conscience, the standard to be applied by this Board in assessing whether an action constitutes an injustice. Moreover, the applicant had notice each time he signed his ISP agreement that he had to have one year of active duty eligibility. The statute (37 U.S.C. § 302e) has always so provided, as have the governing regulations.

Apparently, because there could have been some explanation in the message about the possible effects that changing the ISP anniversary date might have upon end-of-service ISP eligibility, JA noted that **DPAMF1** has taken a position supporting relief. However, JA viewed the lack of additional explanation, under the circumstances, to fall short of the "shock the conscience"

standard required for relief. Consequently, they did not concur. Finally, although the applicant believes it unfair to not pay him special pay for 11 months of services as a CRNA, JA noted that the purpose of such special pay is not compensation for special duty, but rather, the retention of nurse anesthetists. When a CRNA refuses to serve for at least one more year, or lacks the requisite retainability, he is not entitled. †

Although they recommended strongly against relief, JA closed by addressing the question of "the most appropriate way to correct the record." should the Board chose to do so. According to JA, the answer would be to correct the applicant's records to show he selected option four in early 1995 and chose a renegotiated ISP anniversary date of 31 October 1994.

A complete copy of the JA evaluation is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

A copy of the Air Force evaluation was forwarded to applicant on 10 Nov 97 for review and response. As of this date, no response has been received by this office (Exhibit F).

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 injustice. A majority of the Board noted that the applicant was denied special pay in 1996 as a nurse anesthetist because he lacked the required 12-month retainability for receiving the pay. The Board majority further noted that the applicant failed to renegotiate his special pay agreement after the entitlement was increased in 1995. Had he done so, he could have changed the effective date (anniversary date) of his contract resulting in his eligibility to receive the special pay. The applicant asserts that his failure to renegotiate his agreement was the result of inadequate counseling and AFPC/DPAMF1 agrees. After a thorough review of the available evidence, the Board majority believes that corrective action is warranted in this case. It is apparent to the Board majority, that the applicant did not understand the ramifications of his failure to change the effective date of his special pay agreement. In the Board majority's view, the applicant would not have made a decision so contrary to his best interests had he been provided the necessary information so as to clearly understand the consequences of his decision. In view of the

above, and to avoid the possibility of an injustice, a majority of the Board recommends that the applicant's records 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, on 2 Oct 95, he selected Option Four for payment of Incentive Special Pay (ISP) for Certified Registered Nurse Anesthetists; and, that he chose a renegotiated ISP anniversary date of 31 Oct 94.

The following members of the Board considered this application in Executive Session on 19 May 98, under the provisions of AFI 36-2603:

Ms. Patricia J. Zarodkiewicz, Panel Chair
Mr. Jackson A. Hauslein, Member
Mr. Robert W. Zook, Member

By a majority vote, the Board voted to correct the records, as recommended. Mr. Zook voted to deny applicant's request and has submitted a minority report which is attached at Exhibit G. All members voted to correct the records, as recommended. The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 24 Apr 97, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFPC/DPAMF1, dated 1 Aug 97.
- Exhibit D. Letter, AFPC/DPAMF1, dated 9 Sep 97.
- Exhibit E. Letter, AFPC/JA, dated 17 Oct 97.
- Exhibit F. Letter, SAF/MIBR, dated 10 Nov 97.
- Exhibit G. Minority Report.


PATRICIA J ZARODKIEWICZ
Panel Chair



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

Office of the Assistant Secretary

FEB 05 1999

AFBCMR 97-01988

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, on 2 Oct 95, he selected Option Four for Payment of Incentive Special Pay (ISP) for Certified Registered Nurse Anesthetists; and, that he anniversary date of 31 Oct 94.


JOE G. LINEBERGER

Air Force Review Boards Agency