

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 97-02241

COUNSEL: ANTHONY STEFANSON

HEARING DESIRED: NO

MAY 14 1998

~~APPLICANT REQUESTS THAT:~~

Applicant is the widow of a former service member, who requests that she receive the remaining annual payments of her deceased spouse's aviation continuation pay (ACP) for 1991 through 1996.

APPLICANT CONTENDS THAT:

Counsel for the applicant states that he believes the applicant has suffered an extreme injustice. The former service member died in the line of duty during the build-up to Desert Storm. From a legal standpoint, his entitlement to the ACP benefits was fixed as of the date that he signed the ACP contract. Counsel states that all of the exceptions, which would have terminated the entitlement, involved voluntary separation or disqualification of the airman. There was no specific provision in the law or in the regulations for termination in the event of death in the line of duty.

Counsel states that furthermore, after the hostilities ceased, in November of 1991, Congress passed an amendment to the ACP statute which specifically allowed for payment of the full bonus to survivors of flyers who were killed during the Gulf War. However, that amendment was limited to the period of actual hostilities after January 17, 1991.

Applicant's submission, which includes the deceased member's ACP contract and Report of Casualty, is attached at Exhibit A.

STATEMENT OF FACTS:

The 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 Office of

Primary Responsibility (OPR). Accordingly, there is no need to recite these facts in this Record of Proceedings.

AIR FORCE EVALUATION:

The Retention Analyst, AFPC/DPAR, states that applicant's counsel incorrectly states that "There was no specific provision in the law or in the regulations for termination in the event of death in the line of duty." This is incorrect. In the ACP contract signed by the deceased former member, paragraph 2.c.(2) and paragraph 2.c.(3) clearly state that ACP payments will stop when the member is permanently disqualified from aviation service and when the member is no longer entitled to aviation career incentive pay. Unfortunately, upon his death, the deceased former member became ineligible under both of these criteria according to Chapter 3 of AFR 60-13, Aviation Service of Rated Officers, which was in effect at the time of the incident.

Counsel also states that Congress passed an amendment allowing the widow of a pilot killed during the Gulf War to receive payment of the full bonus amount. While this is true, applicant's deceased spouse was not killed during the war, but rather during Desert Shield, the pre-war build-up. As stated by counsel himself, the deceased did not meet the criteria of the amendment and is therefore not entitled to the remainder of his ACP contract.

ACP is not a benefit, but rather a retention incentive that the Air Force uses to retain qualified aviators. It is money exchanged for rated service beyond that of the Undergraduate Flying Training (UFT) Active Duty Service Commitment (ADSC), not a payment that all aviators are automatically entitled to. For this reason, the program is designed to stop ACP payments when the member can no longer fulfill his/her contract obligation. Though in this case, the reason the contract could not be fulfilled is indeed tragic, it is and always has been clearly stated what the requirements for receiving ACP are and, in this instance, those requirements were not met.

A copy of the Air Force evaluation is attached at Exhibit B.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Counsel for the applicant states, in summary, that the Retention Analyst, AFPC/DPAR, is not correct in his assertion that the ACP contract signed by the deceased clearly provides for the termination of payments upon death. The provisions do not clearly address death in the line of duty as a disqualification for ACP payments. If death in the line of duty was a

circumstance that would terminate benefits, Congress would have clearly indicated such.

While it can be debated whether ACP is a "benefit", the Defense Authorization Act, P.L. 100-456 is clear that upon an officers acceptance of the ACP agreement, the amount payable becomes "fixed". The lack of regulations at the time the deceased's contract was executed, the likelihood that he was the only ACP recipient killed during Desert Shield, and the circumstances surrounding his accident, all serve to distinguish this case from any others.

A copy of counsel's response, with attachments, is attached at Exhibit D.

ADDITIONAL AIR FORCE EVALUATION:

The Chief, General Law Division, Office of The Judge Advocate General, AF/JAG, states that they recommend denial of the application for two reasons. First, applicant has identified no military record which contains a correctable error. She does not claim, for example, that her late husband's records show too many years of commissioned service, which reduced the annual ACP payment. Rather, she is asking the AFBCMR to determine that the Air Force's implementation of Title 37 USC 301b is unjust. Second, AF/JAG believes the Air Force's implementation of Title 37 USC 301b is reasonable and does not create an injustice. The ACP statute is a force-management tool enacted to help the Navy and Air Force retain mid-career aviators in critical (i.e., undermanned) specialties by offering a financial incentive to remain on active duty through the 14-year point. Although the statute authorized the services to pay the "total amount" of a multi-year bonus in a lump sum, Congress effectively required annual installments by appropriating only \$36.2 million for the Air Force for Fiscal Year (FY) 1989, the first year of the program.

Furthermore, the statute authorizes the Secretary concerned to recoup, on a pro rata basis, the bonus paid to an aviator, whether in lump sum or installments, who "fails to complete the total period of active duty specified in the agreement." Congress did not further specify particular conditions permitting, requiring, or prohibiting recoupment, leaving the determination of appropriate conditions and circumstances to the Secretary. Given this broad discretion, the Air Force could permissibly have implemented the statute to require pro rata recoupment in every case of failure to complete the agreed period of active duty (including death), regardless of cause. The Air Force did not do that, however; instead, it listed certain conditions under which ACP entitlement would stop and under which recoupment would be effected. The former includes, for example, permanent disqualification for aviation service due to medical or

other reasons, termination of entitlement to aviation career incentive pay (ACIP, or monthly flight pay), and separation for any reason. Circumstances justifying recoupment are more limited.

AFMPC's January 1991 letter to the applicant and AFPC/DPAR's undated advisory opinion state that "death is implied in the ACP agreement's termination provision for permanent aviation service disqualification "due to medical or other reasons." AFPC also suggests that death must terminate ACP because death terminates ACIP, a precondition to receiving ACP. While AF/JAG do not disagree with the first line of reasoning, they think the second is less strained. AFR 60-13, which was in effect at the time of the former member's death, contained provisions for permanently disqualifying officers for aviation service. It does not mention death. ACIP, on the other hand, is payable only to a member who is "entitled to basic pay," and only a member who is "on active duty" (except certain National Guard and Reserve members) is entitled to basic pay. It is well understood that a deceased member is not on active duty.

Where Congress has bestowed a benefit on certain persons and established specific criteria for its receipt, AF/JAG is unwilling to say there is an injustice to those who do not meet the criteria--certainly not an injustice the AFBCMR should attempt to correct. The former member's death was no doubt tragic, but so have been the deaths of other aviators, both before and after the DESERT STORM hostilities, in the Persian Gulf region and elsewhere. If Congress wanted the survivors of every aviator who dies before receiving the full amount of ACP to receive the unpaid amounts, it could easily have said so. AF/JAG believes the specificity with which Congress drafted the provision demonstrates not only the intent to carefully limit its beneficiaries, but also a tacit approval of the services' prior interpretation of Title 37 USC 301b, in which death constituted a reason for terminating ACP. They recommend denial of applicant's request.

A copy of the additional Air Force evaluation is attached at Exhibit E.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

A copy of the additional Air Force evaluation was forwarded to counsel on 23 January 1998 for review and response 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. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After a thorough review of the evidence of record and applicant's submission, the majority of the Board is not persuaded that the applicant should receive the remaining annual payments of her deceased spouse's aviation continuation pay (ACP) for 1991 through 1996. Counsel's contentions are duly noted; however, we do not find these assertions, in and by themselves, sufficiently persuasive to override the rationale provided by AFPC/DPAR and the Office of The Judge Advocate General. We therefore agree with the recommendations of the Air Force and adopt the rationale expressed as the basis for our decision that the applicant has failed to sustain her burden that she has suffered either an error or an injustice. Therefore, the majority of the Board finds no compelling basis to recommend granting the relief sought.

RECOMMENDATION OF THE BOARD:

A majority of the panel finds insufficient evidence of error or injustice and recommends the application be denied.

The following members of the Board considered this application in Executive Session on 24 March 1998, under the provisions of AFI 36-2603.

Mr. Charles E. Bennett, Panel Chair
Mr. Allen Beckett, Member
Mr. Patrick R. Wheeler, Member

By a majority vote, the Board recommended denial of the application. Mr. Bennett voted to correct the records but does not desire to submit a Minority Report. The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 19 Oct 90, w/atchs.
- Exhibit B. Letter, AFPC/DPAR, undated.
- Exhibit C. Letter, AFBCMR, dated 22 Sep 97.
- Exhibit D. Counsel's Letter, dated 15 Oct 97, w/atchs.
- Exhibit E. Letter, AF/JAG, dated 9 Jan 98.
- Exhibit ■ Letter, AFBCMR, dated 23 Jan 98.

CHARLES E. BENNETT
Panel Chair