

RECORD OF PROCEEDINGS  
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 94-03008

MICHAEL A. VESTUTO

COUNSEL: NONE

APR 21 1997

349-44-5895

HEARING DESIRED: YES

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APPLICANT REQUESTS THAT:

He be reinstated into the Air National Guard (ANG), and that he be given retroactive pay and benefits.

By amendment, he be provided all relief that is just and proper, including all subsidiary relief that is within the Board's jurisdiction.

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APPLICANT CONTENDS THAT:

The only reason he was not allowed to reenlist in the ANG was due to his Union activity in his capacity as a civilian technician. His records reflect this and there are many witnesses that can be called upon to bear this out.

In support of his appeal, the applicant provided numerous documents associated with the matter under review.

Applicant's complete submission is at Exhibit A.

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STATEMENT OF FACTS:

Applicant's military personnel records reflect that, on 28 Sep 70, he enlisted in the United States Marine Corps (USMC), and reenlisted on 29 Sep 72. He was honorably discharged on 27 Oct 78 in the grade of staff sergeant. He was credited with 8 years, 1 month, and 1 day of active duty service.

Applicant contracted his initial enlistment in the Air National Guard (ANG) and as a Reserve of the Air Force on 14 Nov 78. He reenlisted in the ANG on 14 Nov 85. He extended his enlistment on three occasions, resulting in an expiration date of his term of obligated service of 13 Aug 93.

Documentation provided by the applicant reflects that, on 9 Jun 93, the applicant was notified by his commander that he did not intend to extend his enlistment beyond 14 Aug 93. The commander indicated that he was under obligation only to the unit and its mission, and had decided not to retain the applicant for the good of the unit and the mission. As related to the applicant on 16 May 93, the reasons were his reluctance to put unit needs ahead of his personal needs, an inability to successfully interact as a team member with workers and supervisors of his section, and his continued inability to perform necessary work functioning of his organization, thereby degrading that organization's contribution to combat effectiveness.

Effective 13 Aug 93, the applicant was relieved of his current assignment, with entitlement to benefits under the Reserve Transition Assistance Program (RTAP). Effective 14 Aug 93, he was assigned to the Retired Reserve Section. He was credited with 22 years, 9 months, and 29 days of satisfactory Federal service. Service per 10 USC 1332 was 22 years and 10 months. He will be eligible to receive Reserve Retired pay on 27 Dec 2001.

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AIR FORCE EVALUATION:

The Readiness and Personal Affairs Section, ANGRC/MPPAR, reviewed this application and recommended denial. MPPAR noted that the applicant has completed over 20 years of service. According to MPPAR, the applicant's commander was within his authority to deny him reenlistment.

A complete copy of the MPPAR evaluation, with attachments, is at Exhibit C.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

In his response, the applicant indicated, in summary, that it is his opinion his attention to detail regarding fulfillment of his duties within the Union created such friction with the incumbent supervisory chain of command, that their best way to eliminate the friction was to end his military career. By ending his military career, management knew they would also be ending his civilian career, which they thought would also end his Union affiliation. He repeatedly refused to back down on issues he firmly believed in, and still believes in, causing the supervisors to look for ways to pressure him until they eventually made the decision to not retain him.

By letter, dated 23 Jun 96, the applicant provided additional documentation for the Board's consideration.

In a letter, dated 26 Sep 96, the applicant indicated that in the last correspondence he received from the AFBCMR, he noted that an additional advisory opinion was required. He stated that he hopes that testimony from people who have knowledge as to what happened will be part of his case before it is presented to the Board for a final decision.

Applicant total responses and additional documentary evidence are at Exhibit E.

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ADDITIONAL AIR FORCE EVALUATION:

Pursuant to the Board's request, the General Law Division, HQ USAF/JAG, reviewed this application and recommended denial. JAG indicated that the first issue is whether the AFBCMR has the authority to grant the requested relief. In JAG's opinion, the AFBCMR does not have the authority. JAG noted that the applicant was denied reenlistment in the Louisiana ANG, a state personnel action outside the scope of the AFBCMR's jurisdiction. According to JAG, the Board lacks power to revoke a state order pertaining to the National Guard. In the case of *Jordan v. National Guard Bureau* the court stated "...AFBCMR, a federal board, cannot order Jordan's reinstatement to the state Guard...Moreover, the AFBCMR is a military board that is arguably not empowered to reinstate Jordan to his civilian technician position in any event." *Jordan v. National Guard Bureau*, 799 F.2d 99 (3<sup>rd</sup> Cir. 1986). See OPJAGAF 1987/77, 25 September 1987. A Technician's civilian personnel records are also beyond the Board's reach. *Ibid*. Therefore, as a matter of law, the AFBCMR cannot grant the applicant's request to reinstate him in the Louisiana ANG or his previous civil service position.

In JAG's view, even if these actions were within the Board's power, the applicant has not carried his burden of demonstrating that an error or injustice occurred. While he was heavily involved in union activities, he has produced no evidence that he did not "fail to put unit needs ahead of his personal needs, fail to successfully interact as a team member with his co-workers and supervisors, or fail to perform necessary work functions to fulfill wartime taskings," the expressed reasons for his reenlistment denial. Applicant apparently expects the Board to make a quantum leap in logic and conclude that merely because he was involved with the union, that the Board must assume the stated reasons for the denial were a sham. He has presented no evidence in support of that position.

JAG noted that the applicant has previously filed an Unfair Labor Practice charge with the Federal Labor Relations Authority (FLRA) (Case No. DA-CA-40174). The FLRA may be the appropriate forum for his request, as he alleges labor relations violations on the part of the ANG, resulting from his union activities. Again, according to JAG, this is not an area the AFBCMR can

address. In summary, JAG indicated that the applicant's requested relief is not within the Board's authority, and even if it were, the applicant has not produced evidence to establish the existence of an error or injustice.

A complete copy of the JAG evaluation is at Exhibit F.

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APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

In his response to the additional advisory opinion, the applicant indicated that in over twenty-two years of Federal service, Marine and Guard, the only documentation is that he did his job and that he did it well. He asks whether all of that gets thrown by the wayside due to one sentence of unsubstantiated allegations. All he seeks from the Board is a decision based upon the facts.

Applicant complete response and additional documentary evidence is at Exhibit H.

Subsequent to the applicant's response, Mr. W---, General Counsel for National Federation of Federal Employees, provided a statement in his behalf.

Mr. W--- noted HQ JAG's assertion that the AFBCMR does not have jurisdiction over a request for reinstatement to the state National Guard. However, he indicated that the Board does have the authority to review the case of a removed National Guard Technician and, "if it determines that an officer's nonretention in the Air National Guard was the consequence of error or injustice, ...correct the officer's federal records to show that his federal recognition has not been withdrawn and that he remains a member in good standing of the ANGUS. While the Board cannot direct his reinstatement in the National Guard of the state, it can reinstate him in a comparable active federal reserve status, restore his pay and order compensatory back pay." Penasaricano v. Llenza, 747 F.2d 55, 57 (1<sup>st</sup> Cir. 1984); Naves v. Gonzales Vales, 752 F. 2d, 756, 770 (1<sup>st</sup> Cir. 1985).

According to Mr. W---, while the applicant requests reenlistment in the Guard, this request must be read as a demand for all status that he is entitled to, including the federal reserve status that the Board can direct, back pay, and benefits. To the extent that this was not specifically sought by the applicant, Mr. W--- stated that the applicant has requested that he inform the Board that he wishes to amend his request for relief to include all relief that is just and proper, including all subsidiary relief that is within the Board's jurisdiction (Exhibit I).

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. We took notice of the applicant's complete submission in judging the merits of the case. However, we did not find it sufficient to override the rationale expressed by HQ USAF/JAG. Specifically, we were unpersuaded by the evidence that the applicant's nonselection for reenlistment **was** based on factors other than those cited by the commander or that the commander abused his discretionary authority. Therefore, in the absence of evidence to the contrary, we adopt their rationale and conclude that no basis exists upon which to recommend granting the relief sought in this application.
4. The applicant's case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issues involved. Therefore, the request for a hearing is not favorably considered.

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THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

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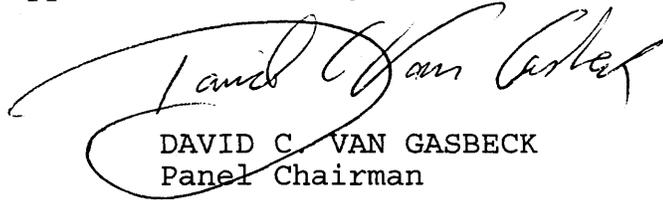
The following members of the Board considered this application in Executive Session on 13 March 1997, under the provisions of AFI 36-2603:

Mr. David C. Van Gasbeck, Panel Chairman  
Mr. Joseph G. Diamond, Member  
Mr. Gary Appleton, Member

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 30 Jun 94, w/atchs.  
Exhibit B. Applicant's Master Personnel Records.  
Exhibit C. Letter, ANGRC/MPPAR, dated 19 Jun 95.  
Exhibit D. Letter, AFBCMR, dated 19 Jul 95.  
Exhibit E. Letter, applicant, dated 6 Sep 95, w/atchs.  
Exhibit F. Letter, HQ USAF/JAG, dated 3 Sep 96.

- Exhibit G. Letter, AFBCMR, dated 24 Sep 96.  
Exhibit H. Letter, applicant, dated 16 Oct 96, w/atchs.  
Exhibit I. Letter, in applicant's behalf, dated 22 Oct 96.



DAVID C. VAN GASBECK  
Panel Chairman