

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 97-03395 ^{SEP 15 1998}

[REDACTED]
[REDACTED]
COUNSEL: NONE

HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

His separation, under the Voluntary Separation Incentive (VSI) program, be reversed and he be allowed to return to active duty.

APPLICANT CONTENDS THAT:

Due to legislation prohibiting separating military members from receiving VSI/SSB benefits if rehired as civilian DoD employees within 180 days of separation, he was prevented from accepting a civilian job. Thus, he requested withdrawal of his pending separation. The Military Personnel Flight (MPF) miscounseled him by informing him that loss of employment was not a sufficient reason to withdraw his separation request and therefore should not be included in his withdrawal request. His separation withdrawal request was disapproved on 18 November 1994 and he was ultimately separated.

Subsequent to his separation, he was notified of the Air Force policy concerning the FY95 Appropriations Act. Based on this policy, his date of separation (DOS) withdrawal request should have been approved.

In support of his request, applicant submits a personal statement and additional documents associated with the issues cited in his contentions (Exhibit A).

STATEMENT OF FACTS:

Information extracted from the Personnel Data System (PDS) reveals the applicant's Total Active Federal Commissioned Service Date (TAFCS D) as 1 July 1983. While serving on active duty, he was promoted to the grade of captain, with an effective date and date of rank of 1 July 1987.

The following information was extracted from documents the applicant provided.

The applicant's 15 August 1994 application for voluntary separation (VSI) was approved on 17 August 1994 by his commander. He received orders, dated 29 September 1994, reflecting his release from active duty and transfer to the Air Force Reserve, effective 18 November 1994. On 24 October 1994, the applicant requested withdrawal of his separation and his squadron commander recommended approval of the request on 24 October 1994. The Air Force office of primary responsibility indicated that the applicant's request was disapproved on 14 November 1994 by HQ AFPC.

On 18 November 1994, the applicant was released from active duty in the grade of captain and transferred to the Air Force Reserve under the provisions of AFR 36-12 (Resign: Early Release Program - Voluntary Separation Incentive). He had completed a total of 11 years, 7 months and 15 days of active duty service.

Through further research with the Officer Promotions Section, HQ AFPC/DPPPOO, it was revealed that, based on the applicant's date of rank, the first time the applicant would have been eligible for promotion to major in-the-promotion zone (IPZ) would have been by the CY94A Major Board, which convened on 22 August 1994.

Information extracted from the Personnel Data System (PDS) reveals that, on 19 November 1994, the applicant was assigned to the Nonobligated Nonparticipating Ready Reserve Section. He was promoted to the grade of major, Reserve of the Air Force, with the effective date of 1 July 1997. On 19 November 1997, the applicant was assigned to the Inactive Status List Reserve Section (ISLRS).

AIR FORCE EVALUATION:

The Retirements Branch, HQ AFPC/DPPRR, reviewed this application and recommended denial. DPPRR stated that the Air Force position has never been one to approve/disapprove withdrawal requests based on projected or loss of civilian employment. The Air Force bases its decisions for withdrawal of applications on the best interests of the Air Force or hardships not common to other Air Force members. The applicant did not provide any documentation of verbal notification by the MPF about the FY95 Appropriations Act in October. DPPRR indicated that the applicant falls under Rule 1 of the Options for Members Separating Under FY95 VSI/SSB Program. After a telephone conversation between DPPRR and the applicant, it was determined that the applicant's misinterpretation resulted from confusion over receipt of the personal notification letter versus being verbally informed by the MPF about the legislation. Rule 4 applies only to those "members whose DOS is within a 90-day period after personal notification." DPPRR stated that the information on the FY95 Appropriations Act, sent on 30 January 1995, is clear on the member's options. Based on Rule 1, since applicant's date of

separation (DOS) was before he received personal notification and he has not provided any confirmed employment documentation during that time frame, there were no options afforded to him other than to separate on his previously approved DOS. Affording the applicant the opportunity to be reinstated into the Air Force would not be fair to other members in similar situations. A complete copy of this evaluation is appended at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant reviewed the advisory opinion and indicated that from the evidence he presented with his original appeal, it is obvious that he was miscounseled, that he received personal notification of the FY95 legislation, and that this notification date was prior to his date of separation. Therefore, Rule 4 should apply to his case. Rule 4 also has an additional criterion, that of a formal application for DoD civilian employment. He provided this documentation with his original application. He applied for a civilian job at Fort Meade as soon as his separation was approved, but withdrew it when he was informed of the FY95 legislation. He provided evidence that he was hired as a civilian contractor (within six weeks of his separation) to fill the same position that he had originally applied for within DoD. He provided evidence that he was hired by DoD in the job that he had originally applied for as soon as the six-month time limit had expired. He also offered to provide written statements from Fort Meade personnel that he had made a formal job application prior to his separation, but was informed by HQ AFPC/DPPRR that this was unnecessary.

In support of his request, he has provided a letter, dated 12 September 1994, documenting his formal application for employment with the National Security Agency (NSA) prior to his date of separation of 18 November 1994. Since the HQ AFMPC/DPMAR policy letter of 30 January 1995 clearly stated that "confirmed employment or formal application pending prior to date of notification" is grounds for withdrawal of a separation request, the evidence shows that his formal application was in place by 12 September 1994. The Air Force did not contact members until after 1 October 1994 concerning the new law affecting VSI/SSB recipients. Based on the evidence he submitted, he believes he should be allowed to reverse his separation and return to active duty.

His complete response to the Air Force evaluation is appended at Exhibit E.

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. Having carefully reviewed this application, the Board majority is persuaded by the evidence submitted that the applicant may have been the victim of an injustice. The Board majority noted that the legislative provision in question became effective 1 October 1994; the applicant's request for withdrawal of his separation was denied on 14 November 1994; and, the applicant's date of separation (DOS) was 18 November 1994. In addition, the Board majority noted the letter from the National Security Agency, dated 12 September 1994, which confirms that the applicant's formal employment application was on file prior to notification of the change to public law. In view of the foregoing, it is the Board majority's opinion that the Military Personnel Flight (MPF) was aware of the new legislation concerning restrictions to the provisions of 10 U.S.C., Sections 1174A (SSB) and 1175 (VSI), but may not have been knowledgeable on the specific requirements since written notification was not issued until 30 January 1995. It is therefore conceivable that the applicant may have been miscounseled at the time he submitted his DOS withdrawal request on 24 October 1994. Hence, it is the opinion of the Board majority that the applicant did fall under the Rule 4 option and should have been retained on active duty. Further, the Board majority noted that, had the applicant not been separated, he would have been eligible for promotion consideration to the grade of major by the CY94A Major Board. The Board majority believes that proper and fitting relief dictates that the applicant also be provided with promotion consideration to the grade of major by the aforementioned selection board. In view of the foregoing, the Board majority 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:

a. He was not released from active duty on 18 November 1994, but was continued on active duty and was ordered PCS to his home of selection pending further orders.

b. An AF Form 77, Supplemental Evaluation Sheet, be prepared and inserted in the record in its proper sequence indicating that no performance report is available for the period when member was not serving on active duty and containing the statement, "Report for this period not available for administrative reasons which were not the fault of the member."

c. It is further recommended that he be considered for promotion to the grade of major by a Special Selection Board for Calendar Year 1994A (22 August 1994) and Calendar Year 1995A (5 June 1995) Major Selection Boards.

The following members of the Board considered this application in Executive Session on 9 July 1998, under the provisions of AFI 36-2603:

Mr. Thomas S. Markiewicz, Panel Chair
Mr. Jackson A. Hauslein, Member
Mr. Michael P. Higgins, Member

By a majority vote, the Board recommended granting the relief sought in this application. Mr. Higgins voted to deny the applicant's request but did not desire to submit a minority report. The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 10 Nov 97, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, HQ AFPC/DPPRR, dated 27 Feb 98.
- Exhibit D. Letter, SAF/MIBR, dated 18 Mar 98.
- Exhibit E. Letters from applicant, dated 20 Apr 98 and 23 May 98, w/atch.


THOMAS S. MARKIEWICZ
Panel Chair



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

SEP 15 1998

Office of the Assistant Secretary

AFBCMR 97-03395

MEMORANDUM FOR THE CHIEF OF STAFF

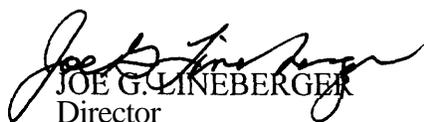
Having received and considered the recommendation of the Air Force Board for Correction of Military Records and under the authority of Section 1552, Title 10, United States Code (70A Stat 116), it is directed that:

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

a. He was not released from active duty on 18 November 1994, but was continued on active duty and was ordered PCS to his home of selection pending further orders.

b. An AF Form 77, Supplemental Evaluation Sheet, be prepared and inserted in the record in its proper sequence indicating that no performance report is available for the period when member was not serving on active duty and containing the statement, "Report for this period not available for administrative reasons which were not the fault of the member."

c. It is further directed that he be considered for promotion to the grade of major by a Special Selection Board for Calendar Year 1994A (22 August 1994) and Calendar Year 1995A (5 June 1995) Major Selection Boards.


JOE G. LINEBERGER
Director

Air Force Review Boards Agency