



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

OCT 21 1998

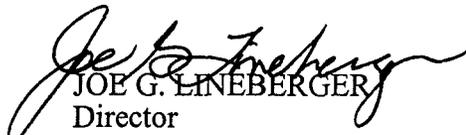
Office of the Assistant Secretary

AFBCMR 95-03636

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 22 May 92, the applicant agreed to remain on active duty as a medical officer for the year beginning 10 Jul 92 and ending 9 Jul 93, and, that he was authorized to receive Additional Special Pay (ASP) by competent authority.


JOE G. LINEBERGER
Director
Air Force Review Boards Agency

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

OCT 21 1998

IN THE MATTER OF:

DOCKET NUMBER: 95-03636
(Case 2)

COUNSEL: NONE

HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

He be retroactively paid a pro-rata portion of his Additional Special Pay (ASP) bonus that he was entitled to receive in 1992.

APPLICANT CONTENDS THAT:

As a physician on active duty, he was entitled to certain allocations of bonus pay. As an ophthalmologist, he was entitled to a yearly bonus called Incentive Special Pay (ISP). He was also entitled to a yearly bonus of ASP. The ASP was a bonus which all active duty military physicians received on a yearly basis, regardless of specialty. In 1992, prior to his separation, he did receive his entitled ISP bonus. However, he did not receive any portion of his ASP bonus for 1992, despite the fact that it became payable several months before his actual separation date. He is appealing now because he believes that he may still be entitled to receive ASP for the period in question.

In support of his appeal, the applicant provided a personal statement and other documents associated with the matter under review.

Applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS:

Applicant was appointed a second lieutenant (Medical Service Corps (MSC)), Reserve of the Air Force, on 28 Apr 82. He was appointed a captain (Medical Corps) (MC), Reserve of the Air Force, on 10 Feb 86 and voluntarily ordered to extended active duty on 10 Jul 90. He was relieved from active duty and his name was placed on the Temporary Disability Retired List (TDRL), effective 27 Oct 92, in the grade of captain. On 18 Aug 95, the applicant's name was removed from the TDRL and he was discharged

in the grade of captain by reason of a physical disability, with entitlement to severance pay. He was credited with 13 years, 2 months, and 10 days of service for basic pay, and 2 years, 3 months, and 17 days of service for severance pay.

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 recommended denial. According to DPAMF1, the applicant admitted in his application to signing an "alternate contract" which was actually a declination statement. The declination statement was attached to the original ASP agreement. Medical officers eligible for ASP receive their agreements through the personnel data system (PDS), approximately 150 days prior to the scheduled payment date. By accepting the ASP payment, the member incurs an active duty service commitment (ADSC) to remain on active duty for one year from the date payment is received. If the ADSC is not totally served the member agrees to repay the unearned portion of the payment. Both the ASP agreement and declination statement are endorsed by the member's commander. The signing of the declination statement does not preclude the member from signing an ASP agreement at a later date.

DPAMF1 indicated that, under the provisions of 37 USC 302, a medical officer who is on active duty under a call or order to active duty for a period of not less than one year is authorized to receive ASP. In order to be entitled to ASP, a medical officer is required to execute a written agreement to remain on active duty for a period of not less than one year beginning on the date the officer accepts the award of such payment. According to AFP 36-58, Health Professional Special Pay, chapter 2, paragraph 2-9, the only time ASP is pro-rated is for a mandatory retirement. Based on these two provisions the applicant would not have been eligible to receive ASP.

DPAMF1 stated that if the applicant would have signed his initial ASP agreement, instead of the declination statement, this would have been evidence of his intent to remain on active duty for the given period of time regardless of the outcome of his hospitalization. In the absence of an executed written agreement, the fact that an officer is qualified to receive ASP and serves on active duty for the required period of time is not sufficient to entitle him to the pay. If failure to sign an agreement was due to lack of information or misinformation and it could be shown that had the agreement been timely presented to the member he would have executed it, then substantial compliance with the requirements of the statute may be inferred. Based on

the facts presented by the applicant, DPAMF1 did not believe he demonstrated the "intent" to remain on active duty.

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

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

In his response, the applicant indicated that, in a sense, he did face a mandatory retirement that is comparable to the examples cited in the governing regulation. The only difference is the fact that his own discharge was ordered prematurely. Therefore, he believes that he should have been given the opportunity to at least apply for a prorated ASP bonus for the time that he remained on active duty following his date of eligibility for that bonus. His failure to submit a written agreement was not solely his responsibility since his commander had refused to sign it. Furthermore, his strong desire to remain on active duty is well-documented in his record, and should give notice of his intentions at that time. Unfortunately, it was not sufficient to convince his caretakers that he should be given the opportunity to do so. His failure to sign the agreement earlier during the hospitalization was indeed due to a lack of information at the time about his eligibility. He certainly would have executed the agreement, regardless of the outcome of his hospitalization, had he known that he would, at the least, be eligible for a prorated bonus upon the contingency of an early discharge. By the very nature of that unplanned discharge, he was unable to apply for the bonus in advance, as usually required in cases of mandatory retirements. When he did attempt to complete the agreement later, his commander failed to contact anyone to verify his eligibility, and did not submit a written declination for his request. He attempted to comply with the provisions of the statute, but was substantially impeded by his own commander. Thus, he decided to pursue the matter at a later date.

Applicant's complete response is at Exhibit E.

With a subsequent response, the applicant provided additional documentary evidence for the Board's consideration (Exhibit F.)

ADDITIONAL AIR FORCE EVALUATION:

Pursuant to the Board's request, The Staff Judge Advocate, AFPC/JA, also reviewed this application and provided an assessment. JA noted that the applicant entered active duty on 10 July 1990, as a medical officer (ophthalmologist) with a date of separation of 9 Jul 94. On 9 Mar 92, following the breakup of his marriage and his return from overseas service in DESERT

STORM, he attempted suicide by ingesting an overdose of prescribed medication. On 27 Oct 1992, his name was placed on the temporary disabled retired list (TDRL), and, on 18 Aug 95, he was discharged with a 10 percent disability rating.

JA also noted that, during his active duty time in 1992, the applicant was entitled to two lump-sum medical special pays: incentive special pay (ISP) for his specialty in ophthalmology and additional special pay (ASP) by virtue of being an Air Force physician. Both are designed as retention tools and require the officer to agree to remain on active duty for a period of not less than one year beginning on the date the officer accepts the award of such special pay. Presumably, his ISP anniversary date was earlier in the year than his ASP date, and he entered his ISP agreement and received payment. When his ASP agreement was presented to him, he was hospitalized away from his base of permanent assignment and declined payment because, in his words, he "was under evaluation for Major Depression at the time, and did not know if [he] would be discharged, or retained." Subsequently, he claimed to have called the Special Pay Branch at AFMPC (AFPC) and was told that he should theoretically be eligible for the bonus. On 22 May 92, he signed the ASP agreement for the period of 10 Jul 92 to 9 Jul 93 and presented it to his commander, who, according to him, declined to approve it.

JA indicated that they concur with AFPC/DPAMF1 insofar as the statement of the governing law is concerned. That is, if the applicant intended to remain on active duty for the year covered by the ASP agreement, he was entitled to receive ASP. Given his initial declination, DPAMF1 concluded he did not have the requisite intent. However, in his reply to DPAMF1's advisory, the applicant has produced a copy of the 1992 ASP agreement he received and which he apparently signed on 22 May 92 agreeing to "remain on active duty for a continuous period of one year." It is this agreement that he claims his commander declined to endorse.

In JA's opinion, it was an error on the part of the commander to not endorse the ASP agreement, either approving it or recommending to the Air Force Surgeon General as designee of the Secretary of the Air Force that the ASP be withheld. At the time, the applicant had an active duty service commitment (ADSC) beyond the one year he would incur by entering the ASP agreement (which would run concurrently with his existing ADSC). According to JA, as long as a medical officer executes a written agreement to remain on active duty for at least one year, he is entitled to additional special pay. The Secretary (or her designee) can withhold the special pay pursuant to regulations. In the Air Force, the regulatory bases for withholding are "unprofessional conduct, medical incompetence, noncompliance with Air Force standards, or substandard performance." JA stated that while one or more bases for withholding might have been present in this case, no action was taken to effect withholding. In the absence

of action by the commander to initiate the withholding by written notification to the applicant and to subsequently forward the case to the Surgeon General, the applicant is entitled to his ASP.

In this case, the applicant has requested the pro-rata portion of ASP corresponding to the portion of the period he served on active duty. While this is a reasonable request and appears to be the equitable solution, the fact is that had his commander processed the agreement as he should have, the applicant would have received the full lump sum in Jul 92, and because his failure to serve for one year was due to disability, none of the amount would have been recouped. Consequently, JA is of the opinion the applicant is entitled to the entire ASP amount without recoupment for the unserved portion.

Accordingly, JA recommended that the Board correct the applicant's military record to reflect that in return for additional special pay, he agreed to remain on active duty as a medical officer for the year beginning 10 July 1992 and ending 9 July 1993. With such correction, the applicant will be entitled to retroactive payment of ASP for such year. JA indicated that even though they have offered their opinion that no portion of the ASP is subject to recoupment, they recommended that this issue be left for the Defense Finance and Accounting Service to resolve in accordance with the applicable provisions of the Department of the Defense pay manual in effect at the time.

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

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

Applicant indicated that it was refreshing to have someone in authority authenticate the true facts of the matter. He appreciated AFPC/JA's honest appraisal of his contention, as well as their admission that he was actually entitled to the full ASP payment under Air Force regulations.

Applicant's complete response is at 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. Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. Having

carefully reviewed this application, we agree with the recommendation of AFPC/JA and adopt their rationale as the basis for our decision that the applicant has been the victim of either an error or an injustice. After reviewing the evidence provided, we are of the opinion that sufficient evidence does exist to support a finding that the applicant attempted to execute an agreement to remain on active duty for at least one year as required, which would have entitled him to ASP. In view of the above, we recommend that the applicant's records be corrected as indicated below.

THE BOARD RECOMMENDS THAT:

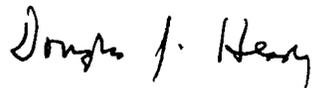
The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that, on 22 May 92, the applicant agreed to remain on active duty as a medical officer for the year beginning 10 Jul 92 and ending 9 Jul 93, and, that he was authorized to receive Additional Special Pay (ASP) by competent authority.

The following members of the Board considered this application in Executive Session on 11 Aug 98, under the provisions of AFI 36-2603:

Mr. Douglas J. Heady, Panel Chair
Mr. Joseph G. Diamond, Member
Mr. Henry Romo, Jr., Member

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

Exhibit A. DD Form 149, dated 26 Oct 95, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, AFPC/DPAMF1, dated 5 Jan 96.
Exhibit D. Letter, SAF/MIBR, dated 29 Jan 96.
Exhibit E. Letter, applicant, dated 3 Feb 96.
Exhibit F. Letter, applicant, dated 11 Feb 96.
Exhibit G. Letter, AFPC/JA, dated 3 Sep 97.
Exhibit H. Letter, AFBCMR, dated 20 Apr 98.
Exhibit I. Letter, applicant, dated 25 May 98.



DOUGLAS J. HEADY
Panel Chair



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE MILITARY PERSONNEL CENTER
RANDOLPH AIR FORCE BASE TEXAS

5 January 1996

MEMORANDUM FOR AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS
(AFBCMR) WASHINGTON, DC 20330-1430

FROM: HQ AFPC/DPAMF1
550 C Street West, Suite 27
Randolph AFB TX 78150-4729

SUBJECT: Application for Correction of Military Record - [REDACTED]

Recommend disapproval of [REDACTED] request for retroactive payment of Additional Special Pay (ASP).

[REDACTED] admits in his application of signing an "alternate contract" which is actually a declination statement (Atch 1). The declination statement is attached to the original ASP agreement (Atch 2). Medical officers eligible for ASP receive their agreements through the personnel data system (PDS), approximately 150 days prior to the scheduled payment date. By accepting the ASP payment, the member incurs an active duty service commitment (ADSC) to remain on active duty for one year from the date payment is received. If the ADSC is not totally served the member agrees to repay the unearned portion of the payment. Both the ASP agreement and declination statement are endorsed by the member's commander. The signing of the declination statement does not preclude the member from signing an ASP agreement at a later date.

[REDACTED] states that once he returned to his home base, pending discharge, he tried to apply for ASP with his commander refusing to indorse the agreement. Under the provisions of 37 U.S.C. 302, a medical officer who is on active duty under a call or order to active duty for a period of not less than one year is authorized to receive ASP. In order to be entitled to ASP, a medical officer is required to execute a written agreement to remain on active duty for a period of not less than one year beginning on the date the officer accepts the award of such payment. According to AFP 36-58, Health Professional Special Pay, chapter 2, paragraph 2-9 (Atch 3), the only time ASP is pro-rated is for a mandatory retirement. Based on these two provisions [REDACTED] would have not been eligible to receive ASP.

If [REDACTED] would have signed his initial ASP agreement, instead of the declination statement, this would have been evidence of his intent to remain on active duty for the given period of time regardless of the outcome of his hospitalization. In the absence of an executed written agreement, the fact that an officer is qualified to receive ASP and serves on active duty

for the required period of time is not sufficient to entitle him to the pay. If failure to sign an agreement was due to lack of information or misinformation and it could be shown that had the agreement been timely presented to the member he would have executed it, then substantial compliance with the requirements of the statute may be inferred.

Based on the facts presented by [REDACTED] we feel that he did not demonstrate the "intent" to remain on active duty, therefore we are unable to grant administrative relief.

[REDACTED], USAF
Superintendent, Special Pay Branch

[REDACTED]

MEDICAL CORPS ADDITIONAL SPECIAL PAY (ASP) AGREEMENT

NAME _____ RANK _____ SSAN _____

I request ASP under the provisions of 37 U.S.C 302b and DOD Pay ~~Manual~~.

Conditions of Agreement. I understand that:

- a. I will receive \$ _____ ASP based on _____ years of creditable service as derived from my medical service pay date.
- b. The effective date of my entitlement to ASP is _____.
- c. I will incur a 1-year active duty service commitment (ADSC) beginning on the effective date of my entitlement as indicated in b above.
- d. The appropriate Air Force officials must approve this agreement.
- e. My entitlement to ASP under this agreement will terminate for any of the following reasons:
 - (1) I do not complete my ADSC under this agreement for any reason.
 - (2) I enter an internship or initial residency.
 - (3) The Surgeon General so directs for reasons that include, but are not limited to, military or medical unprofessional conduct, substandard performance (includes dec credentialing matters or suspension of clinical privileges) or incompetency, or noncompliance with Air Force standards.
- f. If my ASP entitlement is terminated before I complete my ADSC, then I will repay ASP payments made to me under this agreement. If terminated, I am entitled to ASP only for the fraction of the year served and must refund any amount in excess of that entitlement before my release from active duty.
- g. Should I request voluntary release from active duty prior to the end of my ADSC under this agreement, the Secretary of the Air Force or designee will base approval or disapproval on Air Force needs, and my offer to repay the ASP will not influence this decision.
- h. With my projected DOS of _____, I authorize the Air Force to use this contract as authority to extend my DOS to match my ASP ADSC. I understand that I will not receive payment until the Air Force approves my request for extension.

(NOTE: This paragraph not required if the officer has sufficient retainability.)

(Please sign name, rank and SSAN on line)

1st Ind,

TO: MPF/DPMQA
HQ AFMPC/DPAMF1
IN TURN

Recommend approval/disapproval.

(Signature of MTF Commander or Equivalent)

ATCH 2

system as eligible (i.e., incorrect AFSC). If a RIP is not produced, CBPO/DPMQA prepares agreements in the format shown in figure 2-3. AFMPC/DPMMUF1 will prepare ISP contracts for residency training program directors, if eligible.

NOTE: Hospital commanders eligible for ISP must have their agreements indorsed by their MAJCOM/SG.

c. **MSP and MISP RIPs.** Due to the complexity of the contracts and their associated ADCSs, AFMPC/DPMMUF1 will produce MSP and MISP RIPs on eligible officers after talking with the officers or receiving a request from CBPO Special Actions. AFMPC/DPMMUF1 will also produce RIPs for officers currently under MSP or MISP contracts 150 days before their contracts expire. MSP and MISP RIPs will not be available until 1 Jul 93. Until that time, physicians can get blank contracts from their local CBPO Special Actions Office.

2-8. Declination of Health Professional Special Pays. Officers eligible for ASP, NAP, **ISP**, or **MSP** that do not wish to accept the pay must sign a declination statement (figure 2-7).

2-9. Pro-rated ASP for Officers Facing a Mandatory Retirement. Physicians and

dentists facing a mandatory retirement date (i.e., 20-year IRS officers, Regular lieutenant colonels with 28 years of service, Regular colonels with 30 years of service, and retirement eligible officers who have reached their maximum active duty age) may apply for a pro-rated payment for their last ASP contract. To apply, forward ASP contract and a brief letter of explanation to AFMPC/DPMMUF1. Officers must apply for the pro-rated ASP 1 year before their mandatory retirement date.

2-10. Requests For Release From Active Duty While Under a Special Pay Agreement. The Air Force does not favorably consider resignations and requests for release from active duty during the committed period of service of a health professional special pay agreement except for hardship or when in the best interest of the Air Force as defined in AFR 36-12. An officer who receives approval to voluntarily terminate active duty service or has commissioned status terminated by operation of law during the period for which the officer received health professional special pays, must refund the unearned portion of the payment before release from active duty. The refund is pro-rated on a day-for-day basis.

Handwritten signature or initials

ATCH 3



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE PERSONNEL CENTER
RANDOLPH AIR FORCE BASE TEXAS



3 September 1997

MEMORANDUM FOR AFBCMR

FROM: HQ AFPC/JA [REDACTED]
550 C Street West Suite 44
Randolph AFB TX 78150-4746

SUBJECT: Application for Correction of Military Records- [REDACTED]

We provide the following in response to your request that we review and assess the issues raised by the applicant regarding his request for retroactive payment of Additional Special Pay (ASP).

The applicant entered active duty on 10 July 1990, as a medical officer (ophthalmologist) with a date of separation of 9 July 1994. On 9 March 1992, following the breakup of his marriage and his return from overseas service in DESERT STORM, he attempted suicide by ingesting an overdose of prescribed medication. On 27 October 1992, he was placed on the temporary disabled retired list (TDRL), and on 18 August 1995, he was discharged with a 10 percent disability rating.

During his active duty time in 1992, applicant was entitled to *two* lump-sum medical special pays: incentive special pay (ISP) for his specialty in ophthalmology and additional special pay (ASP) by virtue of being an AF physician. Both are designed as retention tools and require the officer to "agree to remain on active duty for a period of not less than one year beginning on the date the officer accepts the award of such special pay." (37 U.S.C. § 302(c)(1)) Presumably, his ISP anniversary date was earlier in the year than his ASP date, and he entered his ISP agreement and received payment. When his ASP agreement was presented to him, he was hospitalized away from his base of permanent assignment and declined payment because, in his words, he "was under evaluation for Major Depression at the time, and did not know if [he] would be discharged, or retained." Subsequently, he claims to have called the Special Pay Branch at then-AFMPC and been told that he should "theoretically be eligible for the bonus." On 22 May 1992, he signed the ASP agreement for the period of 10 July 1992 to 9 July 1993 and presented it to his commander, who, according to him, declined to approve it.

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We concur with AFPC/DPAMF, in their 5 January 1996 advisory insofar as the statement of the governing law is concerned. That is, if the applicant intended to remain on active duty for the year covered by the ASP agreement, he was entitled to receive ASP. Given his initial declination, DPAMF concluded he did not have the requisite intent. However, in his reply to DPAMF's advisory, the applicant has produced a copy of the 1992 ASP agreement he received and which he apparently signed on 22 May 1992 agreeing to "remain on active duty for a continuous period of one year." It is this agreement that he claims his commander declined to endorse.

In our opinion, it was error on the part of the commander to not endorse the ASP agreement, either approving it or recommending to the AF Surgeon General as designee of the Secretary of the Air Force that the ASP be withheld. At the time, the applicant had an active duty service commitment (ADSC) beyond the one year he would incur by entering the ASP agreement (which would run concurrently with his existing ADSC). As long as a medical officer "executes a written agreement ... to remain on active duty for [at least] one year," he is "entitled to additional special pay"¹ (37 U.S.C. § 302(a)(4)) The Secretary (or her designee) can withhold the special pay pursuant to regulations. In the Air Force, the regulatory bases for withholding are "unprofessional conduct, medical incompetence, noncompliance with Air Force standards, or substandard performance." (AFP 36-58, para 3-1) While one or more bases for withholding might have been present in this case, no action was taken to effect withholding. In the absence of action by the commander to initiate the withholding by written notification to the applicant and to subsequently forward the case to the Surgeon General, the applicant is entitled to his ASP.

In this case, the applicant has requested the pro-rata portion of ASP corresponding to the portion of the period he served on active duty. While this is a reasonable request and appears to be the equitable solution, the fact is that had his commander processed the agreement as he should have, the applicant would have received the full lump sum in July 1992, and because his failure to serve for one year was due to disability, none of the amount would have been recouped.² Consequently, we are of the opinion he is entitled to the entire ASP amount without recoupment for the unserved portion.

Accordingly, we recommend the Board correct the applicant's military record to reflect that in return for additional special pay, he agreed to remain on active duty as a medical officer for the year beginning 10 July 1992 and ending 9 July 1993. With such correction, the applicant

¹ When a medical officer is facing mandatory retirement within one year, as alluded to in the DPAMF advisory, he cannot agree to remain on active duty for one year. In this case, there is authority in the regulations to terminate the next-to-last agreement early (with pro-rated recoupment) in order that the officer can enter a new agreement for the final 12 months of active duty.

² The DoD Pay Manual, Part One, para 10527 (1 Jan 93), in relevant part, provided:

c. Recoupment of unearned additional special pay is not required when the officer's failure to complete the period of active duty specified in the agreement is due to:

- (1) Death or disability that is not the result of misconduct or willful neglect and not incurred during a period of unauthorized absence;

will be entitled to retroactive payment of ASP for such year. Even though we have offered our opinion that no portion of the ASP is subject to recoupment, we recommend that this issue be left for the Defense Finance and Accounting Service to resolve in accordance with the applicable provisions of the DoD pay manual in effect at the time.


Staff Judge Advocate


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