

JUL 22 1998

RECORD OF PROCEEDINGS  
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 98-00641

COUNSEL: None

HEARING DESIRED: Yes

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APPLICANT REQUESTS THAT:

His records be corrected to show that he was retired in the grade of colonel, rather than lieutenant colonel.

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APPLICANT CONTENDS THAT:

Last summer, he decided to retire from the Air Force after over 24 years of service to pursue a career in commercial aviation. He planned to retire as a colonel under the provision of the Congressional drawdown program that allows an officer to retire with less than three years in grade. Based on his date of rank to colonel (1 January 1996), he would have been eligible to retire in that grade on 1 March 1998, with two years and two months in grade. Events beyond his control forced him to submit his retirement application and to retire as a lieutenant colonel. He believes that the circumstances of his case and another precedent make a case for his retirement in the higher grade.

Because of the timing of the passage of the FY 1998 National Defense Authorization Act (NDAA), which was signed by the President in November, and the fact that he had received an offer by a commercial airline company for a final training date of 2 December, he was forced to choose between waiting for the legislation to be enacted so that he could retire as a colonel and the post service employment opportunity. He ran out of time and submitted his retirement application on 12 November 1997. Congress passed the FY 1998 NDAA one week later with the drawdown provision which would have allowed him to retire in grade. He believes that this is an injustice because Congress has given the Air Force multiyear authority through FY 1999 to manage the personnel drawdown. He does not know why but the Air Staff awaited the NDAA before initiating the early retirement option.

Given the congressional delay, he requested that his retirement action be considered under the FY 1998 NDAA. His request was denied. He then requested an exception to policy from the Deputy Chief of Staff. This appeal was also denied. He was informed that a waiver which has not been available to many other similarly situated officers could not be granted to him. He believes that this statement was in error and that a precedent exists to allow

him to retire in the grade of colonel. He has provided evidence of a general officer who applied for retirement to be effective 1 April 1998, two months before the officer had accrued 3 years of service in grade. This clearly shows that an exception to policy or a waiver was available to this officer which was not made available to him.

In support of his application, he provided a personal statement and copies of documents and correspondence associated with the events cited in his contentions. The applicant's complete submission is at Exhibit A.

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STATEMENT OF FACTS:

The applicant was a rated officer with a Total Active Federal Commissioned Service Date (TAFCS D) of 10 September 1973. During his commissioned service, he was progressively promoted to the grade of colonel, effective and with a date of rank of 1 January 1996. Information extracted from the Personnel Data System (PDS) indicates that, on 12 November 1997, he submitted an application for retirement. Retirement orders pertaining to the applicant were issued on 14 November 1997. On 28 February 1998, he was relieved from active duty and retired in the grade of lieutenant colonel, effective 1 March 1998. He was credited with 24 years, 5 months and 21 days of total active service for retirement.

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AIR FORCE EVALUATION:

The Chief, Colonel Matters Office, AF/DPOB, reviewed this application and recommended denial. DPOB provided a chronology of the processing of the applicant's application for retirement and stated that, by law, an officer must have three years' time in grade (TIG) to retire in the current grade. The service secretaries have been granted authority to waive up to one year of that time through FY 1999. The purpose of the TIG waiver program is to generate additional voluntary losses above those already projected.

Announcement of the FY 1998 TIG waiver program for colonels and below was delayed this year pending approval of the new end-strength floor authorized in the FY 1998 NDAA. Unfortunately, this delay may have created difficulties for some individuals in making career choices. The President signed the NDAA authorizing the lower end-strength floor on 17 November 1997. DPOB stated that they announced on 20 November 1997 that they would begin accepting applications for the colonel TIG waiver program on 15 December 1997. This date was established to allow time to advertise the program and give everyone an equal opportunity to apply. Each waiver request is evaluated on a case-by-case basis. In the past, these programs have not been retroactive.

DPOB stated that every year many officers decide to retire in a lower grade for various reasons. DPOB summarized the applications received in 1997 and 1998 and stated that, in comparison with the other requests for waiver submitted this year, the applicant's request fits the profile of those requests that were approved.

As additional information, DPOB stated that there are fundamental differences between the authorities that allow TIG waivers for general officers and those that apply to the rest of the force. First, they are not connected to force reduction programs used for colonels and below. Second, the authority was not tied to the FY 1998 Authorization Act; therefore, they were available for use on 1 October 1998. Finally, waivers for general officers are approved by the Secretary of the Air Force on a case-by-case basis in conjunction with the processing of the retirement application.

A complete copy of the DPOB advisory opinion, with attachments, is at Exhibit C.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant reviewed the advisory opinion and expressed a desire to be present when the Board decides his case.

Upon review of the advisory opinion, the applicant reiterated his initial contentions and stated that he was forced to retire as a lieutenant colonel because the Congress of the United States failed to execute its constitutional responsibilities in not passing the FY 1998 NDAA by 1 October 1997. Had the Congress done its job, the drawdown program could have proceeded as in previous years. While some might argue that he could have waited to submit his retirement application until after Congress passed the FY 1998 NDAA, it is his opinion that this position ignores the realities of securing employment in the private sector as well as the uncertainty of when the Congress would resolve their partisan-political bickering and get around to passing the legislation.

The applicant once again noted that the Service Secretaries were authorized to waive up to one year of time in grade through FY 1999. Despite the delays in passing the FY 1998 NDAA, the Air Force had the authority to implement the program. Yet, for some reason, the Air Force chose not to act upon it. Left unsaid however, is the fact that the Appropriations Committees of both Houses of Congress appropriated funds to continue personnel drawdown programs and fund personnel end-strengths. This clearly established the "sense of congress" that should have allowed the Air Force drawdown programs to continue while awaiting the Congress to pass the FY 1998 NDAA. In short, the Air Force had the authority and the funding to allow the program to proceed.

Finally, the Congressional authorization committees were stalemated over an issue totally unrelated to personnel end-strengths. This resulted in not passing the authorization bill in a timely manner thus denying him the opportunity to retire in grade and forcing him to make a decision to submit his retirement application in order to get on with his post-Air Force career.

The applicant's review of the Air Force evaluation is at Exhibit E.

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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. The applicant contends that because the passage of the FY 1998 NDAA was delayed, he had to make a decision whether to apply for retirement in early November 1997, and the date applications were accepted occurred so soon thereafter, his retirement in the grade of lieutenant colonel was an injustice. After reviewing the evidence provided, we do not agree.

a. In November 1997, the applicant was faced with making a decision to either continue on active duty or to retire. The applicant chose to retire so that he could accept civilian employment and enter the training required to accept the position. It is important to remember that his retirement was not mandated; his decision, as excruciating as it may have been, was a personal one.

b. We note no evidence that it was not reasonable and prudent that the Air Force delayed announcing the Colonel TIG waiver program until the legislation had been enacted since it appears the scope of the program was affected by the end-strength floor actually approved. We note that, in hindsight, it appears that the applicant's situation is similar to those of officers who applied after 15 December 1997 and whose requests were approved. It would appear that the profile of requests which are approved changes from year to year. Each individual case is evaluated against the criteria established for the year in which it is submitted and, ultimately, whether or not the application is approved is based primarily on the needs of the Air Force rather than those of the individual applying for retirement. We do not find the fact that the applicant's case met the profile of approved applications is relevant to his case since he voluntarily applied for retirement before the legislation was enacted and the criteria for the waiver program established.

c. Accordingly, in the absence of evidence by the showing he was treated differently than similarly situated officers serving in the grade of colonel or below at the time he submitted his retirement application or that his retirement was processed in a manner contrary to the provisions of the pertinent Air Force policies and instructions then in effect, which implement the law, we agree with the opinion and recommendation of the Air Force office of primary responsibility and adopt their rationale as the basis for our conclusion that the applicant has not been the victim of an error or injustice. Therefore, the applicant's request is not favorably considered.

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 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

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 28 February 1998, with attachments.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Staff Summary Sheet, AF/DPOB, dated 8 April 1998, with attachment.
- Exhibit D. Letter, SAF/MIBR, dated 11 May 1998.
- Exhibit E. Letters (2) from the applicant, dated 29 May 1998.

  
THOMAS S. MARKIEWICZ  
Panel Chair