

OpJAGAF 2018-15, 30 July 2018, SAFPC Authority over Applicant with Expired ETS

TOPIC

The options available to Secretary of the Air Force Personnel Council (SAFPC) over an Applicant with an expired expiration of term of service (ETS) with pending administrative actions.

TEXT OF THE DECISION

This opinion is in response to an inquiry regarding the options available to SAFPC when processing the Director, of the Air National Guard's (DANG) request to drop Applicant from the rolls and in light of Applicant's originally set ETS by his enlistment contract and requests to retire. Due to Applicant's ETS not expiring IAW AFI 36-2134, SAFPC has the authority to: (1) Act on Applicant's request to transfer to the retired reserve; (2) Act on Applicant's request for retirement in lieu of demotion; and (3) Act on command's recommendation to drop Applicant from Air Force rolls.

BACKGROUND

Applicant was a drill status guardsman at the time of his arrest on 29 March 2014, in the company of a 15-year-old he had taken on a cruise. Federal authorities prosecuted Applicant for violations of Title 18, United States Code (U.S.C.) § 2423, *Transportation With Intent To Engage in Criminal Sexual Activity*, and the Federal District Court for the Southern District of Texas sentenced Applicant on 3 November 2015 to 183 months of incarceration followed by ten years of supervisory probation. In a separate proceeding on 23 February 2017, federal authorities prosecuted Applicant for violations of 18 U.S.C. § 2251a, *Sexual Exploitation of a Child – Production of Child Pornography*, and the United States District of Kansas sentenced him to 180 months of confinement, to be served concurrently with the 3 November 2015 sentence.

On 31 March 2014, Applicant's duty status in the Military Personnel Data System (MilPDS) was updated to reflect that he was arrested or detained by civil authorities. In addition, his military chain of command terminated him from his "technician" employment on 16 May 2014. On 16 September 2014, Applicant's commander initiated administrative discharge action. On 9 March 2015, Applicant's commander additionally initiated administrative demotion action. Finally, on 5 February 2016, The Adjutant General of the State National Guard decided to recommend that SecAF drop Applicant from the rolls of the Air Force.

Applicant repeatedly requested a transfer to the retired reserve. First, on 5 November 2014, Applicant requested to transfer to the retired reserve ("retire") utilizing Air Force Form 131, *Application for Transfer to the Retired Reserve*. On 15 February 2015, Applicant updated this request.¹ Next, pursuant to AFI 36-3209, para. 4.13.2., Applicant requested to retire after his commander initiated administrative discharge action,² which suspends further action until the request to retire is acted upon.³ Further, on 22 May 2015, he requested to retire in lieu of the

¹ Applicant originally requested to be transferred to the retired reserve effective "ASAP" but later specified a date of 20 June 2015 in order for responsible agencies to properly process the request.

² Applicant's response to his administrative demotion action is undated.

³ AFI 36-3209, para. 4.13.2.1.

administrative demotion action that his commander originated. Applicant specifically stated his request to retire in lieu of the administrative demotion was also in accordance with the retirement application that he previously submitted on 15 February 2015. An application to retire in lieu of demotion must be processed to SAFPC for final approval/disapproval.⁴ Finally, on 27 June 2016, Applicant requested to retire in lieu of any recommendation that SecAF drop Applicant from the rolls of the Air Force.

On 17 March 2015, Applicant's commander recommended denial of Applicant's request to retire as reflected on Air Force Form 131 because Applicant committed serious offenses and engaged in a pattern of misconduct. On 13 May 2015, the Director, Total Force Service Center disapproved and closed without action Applicant's request to retire submitted via Air Force Form 131 for the reason that Applicant had civil charges pending against him. In the denial memorandum, the Director provided key instructions. The instructions explicitly stated after a final decision is made (in federal court) and because Applicant requested retirement, the request for retirement should be forwarded to SecAF for approval or disapproval of the retirement and appropriate grade determination. Applicant's commander apprised him of this result on 13 July 2015 when he notified Applicant of his intent to proceed with the administrative demotion action. According to MilPDS, Applicant's ETS is 17 February 2016, as established by his enlistment contract.

GUIDANCE

Title 10 United States Code, Section 12107, *Army National Guard of the United States: Air National Guard of the United States: enlistment in*

Department of Defense Instruction 1332.14, *Enlisted Administrative Separations*, Incorporating Change 3, 22 March 2018⁵

Air Force Instruction (AFI) 36-2134, *Air Force Strength Accounting Duty Status Program*, 4 August 2014

AFI 36-2502, *Enlisted Airman Promotion/Demotion Programs*, Incorporating Change 2, 14 October 2016⁶

AFI 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force*, 27 July 2017, superseding Air National Guard Instruction (ANGI) 36-2002, *Enlistment and Reenlistment in the Air National Guards and as a Reserve of the Air Force*

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, Incorporating Through Change 3, 20 September 2011

⁴ AFI 36-2502, para. 6.6.

⁵ The section encompassing change 3 of this DoDI is not relevant to the facts of this advisory opinion.

⁶ The portions of AFI 36-2502 referenced in this opinion were already incorporated prior to the latest change on 14 October 2016.

DISCUSSION

Question 1: Since Applicant's ETS was on 17 February 2016, does SAFPC have any authority at this time to take any action against Applicant? If so, what does SAFPC have the authority to do? If not, what status does Applicant hold at this moment?

Answer: Yes. Applicant has been confined in a federal civilian confinement facility since his arrest on 29 March 2014. His confinement status is considered non-creditable service, also referred to as lost time or bad time; therefore, his ETS has not expired.⁷ On 31 March 2014, Applicant's strength accounting duty status in MilPDS was updated to reflect a code of "04," which means civilian confinement (under arrest, pending trial, awaiting sentencing).⁸ As a result, Applicant's service dates will be adjusted forward by the number of days of lost time charged.⁹ As an enlisted member, Applicant can only be charged lost time for the period of his enlistment (i.e., 679 days).¹⁰ Thus, the 679 days remaining on Applicant's ETS is essentially tolled until he returns to a "good" duty status.

If Applicant is not sooner dropped from the rolls of the Air Force, administratively discharged, or permitted to transfer to the ready reserve, he will be returned to a good duty status when he is released from confinement and present for duty.¹¹ Once Applicant is returned to this status, MilPDS will automatically generate a lost time update and the final number of days comprising lost time is determined by the "from" and "thru" dates as reflected in MilPDS.¹² The same day lost time has been updated in MilPDS, a report will be produced showing his old and adjusted service dates, serving as the source document for his new service dates.¹³ Only then will Applicant's ETS be adjusted based on the amount of time left on his enlistment prior to his confinement. Specifically, his ETS will be adjusted forward by 679 days from the date he returns to a good duty status.

Therefore, Applicant's ETS is tolled and he is still an enlisted military member subject to the jurisdiction of the Air Force.¹⁴ Accordingly, SAFPC has the authority to act on both Applicant's and his chain of command's requests.

Question 2: Does SAFPC have any authority to act on Applicant's October 2014 and/or February 2015 requests to retire in lieu of administrative discharge?

⁷ AFI 36-2134, para 3.4.

⁸ AFI 36-2134, Attachment 2, Table A2.1. (Notably, Applicant's current MilPDS status should currently reflect a code of "05," which means civilian confinement – sentenced prisoner/30 days or more. However, this administrative oversight does not impact Applicant's current duty status or ETS.)

⁹ AFI 36-2134, para. 3.4.1.1.

¹⁰ AFI 36-2134, para. 3.4.1.3.

¹¹ AFI 36-2134, paras. 3.4.1.4, 3.6.1.2, 3.6.2.

¹² AFI 36-2134, para. 3.4.1.

¹³ AFI 36-2134, para. 3.4.2.1.1.

¹⁴ 10 U.S.C. §12107 states: "Under regulations to be prescribed by the Secretary of the Air Force, a person who enlists in the Air National Guard, or whose term of enlistment in the Air National Guard is extended, shall be concurrently enlisted, or his term of enlistment shall be concurrently extended, as the case may be, as a Reserve of the Air Force for service in the Air National Guard of the United States."

Answer: Yes. Applicant is an enlisted military member subject to the jurisdiction of the Air Force since his ETS is tolled. The retirement requests are a part of the administrative discharge action initiated against Applicant and are still outstanding matters for SecAF or her designee to act upon.

Question 3: Does SAFPC have any authority to act on Applicant's 22 May 2015 request to retire in lieu of administrative demotion?

Answer: Yes. Applicant is an enlisted military member subject to the jurisdiction of the Air Force since his ETS is tolled. However, for the reasons explained in the answer to question 4, below, Applicant did not make a separate request to retire in lieu of the administrative demotion.

Question 4: Is Applicant's administrative demotion order, dated 24 September 2015, legally sufficient, even though Applicant's retirement in lieu of demotion action was never acted upon by SAFPC?

Answer: No. It would appear that all responsible parties initially followed the procedures outlined in AFI 36-2502.¹⁵ With respect to demotion actions, members may request to resign or retire,¹⁶ in lieu of demotion at any time before publication of demotion orders.¹⁷ Applicant applied for retirement *prior* to the initiation of the demotion action, but did not file another request to retire in lieu of demotion.

At the time that Applicant's squadron commander notified Applicant of the commander's intent to recommend the TAG demote Applicant, there was already a pending retirement request. Specifically, Applicant requested to be transferred to the retired reserve via Air Force Form 131, dated 15 February 2015. In response to the demotion action notification, Applicant did not make a separate or new request to retire in lieu of the action. Instead, in the first indorsement to the notification memorandum from his commander, Applicant requested to be permitted to retire in lieu of the demotion action in accordance with the retirement application that he submitted prior to the demotion action notification.

On 13 May 2015, the Director, Total Force Service Center disapproved the updated Air Force Form 131,¹⁸ and closed it without action. The squadron apprised Applicant of this result when he notified Applicant of his intent to proceed with the administrative demotion action.¹⁹ However, in notifying Applicant's chain of command that his retirement application was disapproved and closed, the Director, Total Force Service Center provided key instructions. The instructions explicitly stated after a final decision is made (in federal court) and because Applicant requested retirement, *the request for retirement should be forwarded to SAFPC for approval or disapproval of the retirement.* While the Director's actions to disapprove and close out the request were within

¹⁵ AFI 36-2502, para 11.1.3.2 details the action by the immediate commander after receipt of the member's reply or if the member fails to respond to the notification of intent to demote.

¹⁶ IAW 36-2502 and AFI 36-3209

¹⁷ AFI 36-2502, para. 11.1.3.1.5.

¹⁸ Document is dated 15 February 2015 with a requested effective retirement date of 20 June 2015.

¹⁹ The Director, Total Force Center is assigned to HQ ARPC/DPT. This agency has the authority to approve or disapprove Applicant's request to transfer into the Retired Reserve. AFI 36-3209, para 5.12 states: "The [SecAF] or designee (HQ ARPC/DP) has the authority to approve or disapprove applications for transfer or assignment to the Retired Reserve as shown in Table 5.2 and Table 5.3." Moreover, table 5.2 states: "If [the] individual is a non-[extended active duty] applicant who is pending separation or discharge action and is eligible under criteria in paragraph 5.8, then [SecAF] or HQ ARPC may disapprove [the] application for transfer to the Retired Reserve."

the Director's authority, he clearly preserved the ultimate decision on retirement for SAFPC as required. Applicant received his final conviction and sentence on 23 February 2017. Thus, Applicant's request on 15 February 2015 to retire is now ripe for SAFPC's action and the demotion action should not have been acted upon until SAFPC's decision on retirement.

CONCLUSION

Based on the foregoing, we conclude it is legally permissible for AFBCMR to grant the request. Due to Applicant's ETS not expiring IAW AFI 36-2134, SAFPC has the authority to:

1. Act on Applicant's request to transfer to the retired reserve;
2. Act on Applicant's request for retirement in lieu of demotion; and
3. Act on command's recommendation to drop Applicant from Air Force rolls.

In order to perfect the record in this case, SAFPC should merge Applicant's requests to retire as Applicant has repeatedly requested to be retired in lieu of adverse actions. Pursuant to HAFMD 1-24, SAFPC is required to consider requests to retire in lieu of demotion. The Board should first consider whether Applicant should be transferred to the retired reserve. If approved, Applicant would retire as a senior master sergeant, which we do not recommend.²⁰ If SAFPC denies all of Applicant's requests to retire, then it should next consider command's recommendation to drop Applicant from the rolls, which we recommend due to the serious nature of the offenses committed by Applicant.²¹ If SAFPC does not approve Applicant being dropped from the rolls of the Air Force, and disapprove all of Applicant's requests to retire, then the package should be returned to the unit and KS TAG would then have the authority to take action on the demotion since SAFPC does not have the authority to act on the demotion action.²²

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²⁰Currently, Applicant's personnel records incorrectly reflect that he is an Airman; Applicant is a senior master sergeant.

²¹If the Board elected to first act on command's request to drop Applicant from the rolls and approved it, doing so would render Applicant's earlier requests to retire moot. We do not recommend this course of action as it does not protect the Board's record on its decisions in this case.

²²HAFMD 1-24_Addendum B, *Re-Delegation of Authority for Individual Personnel Actions HAFMD 1-24 Assistant Secretary of the Air Force (Manpower and Reserve Affairs)*, 28 July 2018, paragraph 7, Figure 3, k. Additionally, pursuant to AFI 36-2502, para. 11.1.2.1., TAG is demotion authority for enlisted members serving in enlisted grades of master sergeant and above master sergeant.