OpJAGAF 2019-19, 27 March 2019, REENLISTMENT – Denial of Request to Reenlist

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TOPIC

Whether the Assistant Secretary of the Air Force for Manpower and Reserve Affairs (SAF/MR) may grant Applicant's request to reenlist despite his civilian court conviction.

TEXT OF THE DECISION

Applicant has requested an exception to policy under Air Force Instruction 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force*, paragraph 5.11.16, which allows "Airmen [to] request waivers to reenlist to their unit commander/civilian director because they have … a civil court conviction." The case file complies with Air Force Instruction 36-2606. His chain of command recommends disapproval. It is legally permissible to either grant or deny Applicant's request. If SAF/MR decides to disapprove the request, we recommend doing so expeditiously as the expiration of Applicant's term of service is May 3, 2019. We concur with the recommendation to disapprove the request.

BACKGROUND

Applicant's Total Active Federal Military Service Date is May 4, 2001. Accordingly, he has served for approximately 17 years and 11 months. Both his date of separation and the expiration of his term of service are May 3, 2019.

On August 9, 2018, Applicant pleaded guilty in an overseas location to "Violation of Act on the Aggravated Punishment, etc., of [*sic*] Specific Crimes – Infliction of Bodily Injury via Hit-and-Run." Specifically, on January 8, 2018, Applicant was driving his vehicle in the civilian community in the host nation. He was driving at night on a two-lane road without sidewalks. According to host nation driving regulations, he was required to ensure there were no pedestrians in the road. Applicant proceeded through the intersection and struck a 55-year-old citizen of the host nation, inflicting bodily injury on the pedestrian. He then fled the scene without taking any actions to aid the victim. He was sentenced to six months of confinement, suspended for two years.[1]

In addition to the hit-and-run, Applicant has many negative quality force indicators in his record. He received a Letter of Admonishment for allowing his girlfriend and her two children, all of whom are citizens of a third country, to live in his on-base residence without notifying the Special Security Officer. He received a Letter of Counseling for failing to complete his assigned duties. He received his first Letter of Reprimand for failing to go to his place of duty. His commander initiated a Security Information File action because of Applicant's pattern of misconduct.

[1] It is unclear from the record that Applicant spent any time in civilian confinement after the incident. If Applicant spent any time in confinement it would count as bad time, which he would need to make up prior separating, unless it is waived by proper authority.

Applicant received his second Letter of Reprimand for failure to obey a lawful order. He received his third Letter of Reprimand for making false official statements. Applicant received his fourth Letter of Reprimand for failing to report to duty on time. He received his fifth Letter of Reprimand for the hit-and-run incident. Additionally, his commander demoted him to the grade of technical sergeant for failing to meet his responsibilities as a master sergeant.

On October 5, 2018, his commander received Applicant's Air Force Form 901, which indicated Applicant is ineligible to reenlist because of the civilian conviction. The commander denied Applicant's request to reenlist. Applicant then requested an exception to policy to reenlist "to extend to reach minimum retirement eligibility." The NAF/CC denied Applicant's request and recommended all reviewing authorities likewise deny it. The MAJCOM/CC concurred with the recommendation to deny Applicant's request.

LAW

Title 10, United States Code, Section 1176, entitled "Enlisted Members; Retention after Completion of 18 or more but less than 20 years of Service," states in paragraph (a):

> [A] regular enlisted member who is selected to be involuntarily separated or whose term of enlistment expires and who is denied reenlistment, and who on the date on which the member is to be discharged is *within two years of qualifying for retirement* … shall be retained on active duty until the member is qualified for retirement … unless the member is sooner retired or discharged under any other provision of law. (*emphasis added*)

By policy in Air Force Instruction 36-3206, the Air Force affords additional procedural protections for enlisted members with more than 16 years of service. Air Force Instruction 36-2606, paragraph 2.6.15, discusses an exception to policy to extend one's enlistment to reach the minimum retirement eligibility:

> Career Airmen who have been denied reenlistment and who will complete at least 16 years, but fewer than 20 years [Total Active Federal Military Service] on current [Expiration Term of Service] may elect to request an [Exception to Policy] to extend to reach minimum retirement eligibility; no other extension/extension reason will be considered. Any commander in the reviewing chain may approve the [Exception to Policy] in writing; however, the Chief, Force Management Policy Division [AF/A1PP] is the final disapproval authority. (Note: This [Exception to Policy] when approved, terminates the appeal process and the Airman remains in [Reenlistment Eligibility] code 2X, but obtains retainability as directed. These Airmen retire with [Reenlistment Eligibility] code 2V, unless otherwise discharged or other appropriate [Reenlistment Eligibility] code applies. If the [Exception to Policy] is denied, then the Airman may within 10 calendar days elect to appeal the denial of reenlistment in accordance with (IAW) para 2.6.13 of this instruction.

The subparagraphs to 2.6.15 detail what a career Airman must do to request an exception to policy from AF/A1PP. However, this particular option is available only to Airmen who *have been denied reenlistment*, not those who are *ineligible to reenlist*.

Air Force Instruction 36-2606, Table 5.6, Item 13, provides a civilian conviction is a condition that bars immediate reenlistment. The Airman remains ineligible to reenlist for the length of the maximum allowable confinement under the Manual for Courts-Martial for the same or most closely related offense. In this case, Applicant was convicted of Infliction of Bodily Injury via Hit-and-Run. There are two closely related offenses in the Manual for Courts-Martial: Article 128, *Assault* (specifically, aggravated assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm); and Article 134, *Fleeing scene of accident*. The maximum punishment for the Article 128 violation is 3 years' confinement; and the maximum punishment for Article 134 is 6 months' confinement. Accordingly, Applicant is ineligible to reenlist for the next 42 months from the date of his conviction.[2]

As provided in Air Force Instruction 36-2606, paragraph 5.11.16, Airmen may request waivers to reenlist to their unit commander/civilian director if they have a civil court conviction. The Airman must request a waiver to reenlist. If the commander disapproves the waiver, the Airman may elect to appeal the disapproval decision. See Air Force Instruction 36-2606, paragraph 5.11.16.2. The Airman appealing the decision then follows the steps outlined in Air Force Instruction 36-2606, paragraphs 2.6.13 and 2.6.14. Although these two paragraphs do not discuss waivers for those who are *ineligible* to reenlist, they provide a framework for processing the request through the chain of command to the appeal authority.

Under paragraph 2.6.14.4, any commander in the reviewing chain may approve an Airman's appeal. Appeal approval at any level restores the Airman's reenlistment eligibility effective back to the date of the commander/civilian director's disapproval. Further, if the Airman was rendered ineligible for certain personnel actions, these actions will receive reconsideration based upon the date the commander/civilian director originally denied the request.

ANALYSIS

Applicant's chain of command recommends denying Applicant's request. Applicant is ineligible to reenlist due to his civilian conviction involving causing injury during a hit-and-run incident. A local national was injured and could have been killed because of his actions, and he did not even stop his vehicle to make sure the victim was alive or if the victim was in need of care. He asserts in his request he is not guilty of the offense; rather, he claims someone else was using his vehicle. He avers he only pleaded guilty because his attorney advised him to do so to resolve the matter more quickly. However, as the Supreme Court of the United States held, "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975). This conviction renders him ineligible to reenlist for almost three more years.[3]

[2] The servicing legal office provided a memorandum to the FSS in which the legal office stated "The most similar offense in the MCM is Article 134, Fleeing scene of an accident." This interpretation leads to the conclusion that Applicant is now eligible to reenlist. Although informative to FSS, this opinion is not controlling as to SAF/MR. Even if SAF/MR chooses to treat him as eligible to reenlisted, we would recommend denying the request.

[3] The time limit imposed in Air Force Instruction 36-3206, Table 5.6 runs from the date of conviction; in this case, August 9, 2018. As discussed above, the maximum punishment for closely related offenses under the Manual for Courts-Martial is 42 months' confinement. Eight months have passed since his conviction, so he is ineligible for the next 34 months.

Even if he were eligible to reenlist; that is, even if this case involved a denial of reenlistment – Applicant should not be allowed to continue serving in the Air Force. Even without the hit-and-run conviction, he has demonstrated an inability to conform to military rules and standards, amassing a compendium of adverse actions in the last three years. This additional misconduct is certainly relevant when determining whether it would be in the best interest of the Air Force to grant Applicant's request.

It is also worth noting, Air Force Instruction 36-2606, paragraph 2.3.1, states "[c]ommander/civilian directors will not use the [Selected Reenlistment Program] to deny reenlistment when involuntary separation is more appropriate." (*Emphasis added*) In this case, if SAF/MR denies Applicant's request, Applicant will leave the Air Force with an honorable separation, rather than possibly leaving with a more appropriate service characterization, because his commanders chose to use the Selective Reenlistment Program, in contradiction to Air Force policy, rather than initiate administrative discharge.

If SAF/MR grants the request, Applicant's commander could then pursue administrative separation action. If this occurs and Applicant is recommended for discharge, he would have over 18 years of service by the time he could be separated. Title 10, U.S.C., Section 1176, entitled "Enlisted Members; Retention after Completion of 18 or more but less than 20 years of Service," states in paragraph (a):

> [A] regular enlisted member who is selected to be involuntarily separated[4] or whose term of enlistment expires and who is denied reenlistment, and who on the date on which the member is to be discharged is within two years of qualifying for retirement … shall be retained on active duty until the member is qualified for retirement … unless the member is sooner retired or discharged under any other provision of law.

Although the statute discusses members who are "selected to be involuntarily separated," the statute does not preclude administratively discharging Applicant under adverse, or "other than honorable," conditions.[5]

"As a rule, one or more acts or conditions on which a recommendation for discharge is based will have occurred or existed in the current enlistment." AFI 36-3208, *Administrative Separation of Airmen*,[6] paragraph 5.3.1. Since 10 U.S.C. § 1176(a) *extends* the enlistment until Applicant is qualified for retirement, rather than signing a new contract for a new enlistment, the misconduct that served as the basis for the denial of reenlistment is still available for the commander to use to initiate discharge, if she determines discharge is warranted. However, Applicant will be entitled

[4] 10 U.S.C. § 1141 (3), Involuntary separation defined, states an enlisted RegAF member shall be considered to be involuntarily separated if "the member is (A) denied reenlistment, or (B) involuntarily discharged under *other than adverse conditions*, as characterized by the Secretary concerned." (*emphasis added*)
[5] *See Ruffin v. United States*, 509 F. App'x 978 (Fed. Cir. 2013) (per curium) (unpublished) (10 U.S.C. § 1176 only protected those who were not discharged under adverse, or "other than honorable," conditions).
[6] AFI 36-3208, *Administrative Separation of Airmen*, 9 July 2004, Incorporating Through Change 7, 2 July 2013, as updated by AFGM2018-01, dated 14 June 2018.

to a discharge board[7] and lengthy service consideration.[8] Although it is questionable whether this Airman should leave the Air Force with an honorable service characterization, the outcome at a discharge board is never guaranteed.

If SAF/MR denies the request, Applicant's command must be prepared to out-process Applicant by the end the day on Tuesday, May 3, 2019. Applicant entered the Air Force on May 4, 2001. His date of separation is effective at midnight on May 3, 2019. At that time he will have completed 18 years of service. At 18 years and one second, he will be *within* two years of retirement, and would qualify for the sanctuary provisions of 10 U.S.C. § 1176. Since he is still stationed in the overseas location, there are myriad processes that must occur to ensure he is separated on May 3, and the Air Force needs to ensure it follows its standard procedures for out-processing members from overseas locations. In addition to attending TAPS and ensuring his household goods clear customs, Applicant must depart the overseas area with sufficient travel time to reach the CONUS by his projected date of separation. Most importantly, he needs to have his out-processing complete, to include his final pay and accounting, by May 3, 2019.

CONCLUSION

Denying Applicant's request will guarantee Applicant's removal from the Air Force quickly, but with an honorable service characterization. Approving his request would provide the command with an opportunity to recommend discharge with a less favorable service characterization, although neither discharge nor a less severe characterization at a discharge board are guaranteed. We recommend the request be denied and that Applicant be out-processed as quickly as possible.

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[7] AFI 36-3208, paragraph 6.2.2.1, 6.2.2.2.
[8] AFI 36-3208, Section 6F. Airmen entitled to lengthy service consideration are not discharged until their cases have been referred to HQ AFPC/DPMARS2 for further review.