

## ***OpJAGAF 2018-51, 18 December 2018, DENIAL OF REENLISTMENT***

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### ***TOPIC***

Denying Reenlistment for Airmen with more than 18 years of service.

### ***Text of the decision***

Applicant requests an exception to policy (ETP) under AFI 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force*, paragraph 2.6.15, which allows “[c]areer Airmen who have been denied reenlistment and who will complete at least 16 years, but fewer than 20 years TAFMS on current ETS...to request an ETP to extend to reach minimum retirement eligibility....” The case file is in accordance with AFI 36-2606. His chain of command recommends disapproval. However, we concur with the recommendation of MAJCOM/JA and recommend that, in accordance with Title 10, United States Code, Section 1176, Applicant’s request for an ETP be granted.

### ***Background***

Applicant entered active duty on 1 July 2000. As of the date of this legal review, Applicant has over 18 years, 4 months of Total Active Federal Military Service (TAFMS). His current term of enlistment started 11 November 2013 and expired 10 August 2018.

On 11 December 2017, Applicant’s supervisor recommended him for reenlistment. On 10 January 2018, the squadron commander, non-concurred and non-selected him for reenlistment, and Applicant received notification of this decision on the same day. He then requested an exception to policy to extend him to the minimum retirement eligibility. On 1 March 2018, the squadron commander recommended denial of the exception to policy. On 19 March 2018, the group commander also recommended denial, as did the wing commander on 4 April 2018. Applicant’s chain of command recommends against the exception to policy based on his many instances of misconduct over the last two years, including violating flight policy, dereliction of duty, maltreatment of subordinates, violating a no-contact order, and making a false official statement.

In response to the denial of reenlistment, Applicant acknowledges his misconduct, but asserts he has a lot to give to the Air Force. He also describes his positive impacts on the Air Force.

On 7 September 2018, MAJCOM/JA conducted a legal review of the ETP request and, noting that Applicant was over 18 years TAFMS, recommended approval of the ETP. MAJCOM/JA reviewed the legislative history of 10 U.S.C. § 1176(a),<sup>1</sup> and discussed how the statute was intended to “provide the same tenure protection to enlisted members that is afforded under current law to officers who have completed 18 but less than 20 years of active duty for retirement eligibility

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<sup>1</sup> The wing legal review did not refer to or address the implications of 10 U.S.C. § 1176(a).

purposes.”<sup>2</sup> On 21 September 2018, after having reviewed the entire case file, MAJCOM/CD recommended Applicant’s ETP request be denied.<sup>3</sup>

The case file was forwarded to AF/A1PP for final action on the ETP request in accordance with AFI 36-2606, paragraph 2.6.15.

### ***Law and Analysis***

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 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.

Air Force Instruction 36-2606, *Reenlistment and Extension of Reenlistment in the United States Air Force*, 27 July 2017, paragraph 2.6.15 states:

Career Airmen who have been denied reenlistment and who will complete at least 16 years, but fewer than 20 years TAFMS on current ETS may elect to request an ETP to extend to reach minimum retirement eligibility; no other extension/extension reason will be considered. Any commander in the reviewing chain may approve the ETP in writing; however, the Chief, Force Management Policy Division is the final disapproval authority. Note: This ETP when approved, terminates the appeal process and the Airman remains in RE code 2X, but obtains retainability as directed. These Airmen retire with RE code 2V, unless otherwise discharged or other appropriate RE code applies. If the ETP 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 ETP from AF/A1PP.

This ETP process does not impede a career Airman’s ability to appeal the denial of reenlistment to the Secretary, if the ETP is denied. AFI 36-2606, paragraph 2.6.13 and 2.6.14, provides for the appeal process. So, in Applicant’s case, if A1PP disapproves the ETP, Applicant’s appeal will be forwarded for Secretarial action in accordance with Headquarters Air Force Mission Directive 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.j.

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<sup>2</sup> H. Con. Rep. No. 102-966, 102d Cong., 2d Sess. 709, reprinted in 1992 U.S.C.C.A.N. 1636, 1800. Such protection is afforded for regular officers in 10 U.S.C. 631 and 632, both of which provide for the involuntary discharge of officers who twice failed to be promoted unless they have 18 years of service on the day on which he is to be discharged, in which case they are retained until retirement eligibility.

<sup>3</sup> AETC/CD provided no justification for his recommendation. The memorandum simply reads: “I have thoroughly reviewed the case file on [Applicant’s] EPT request and recommend his request be denied.”

And, if A1PP approves the ETP, the appeal process is terminated and Applicant remains on active duty until he reaches minimum retirement eligibility.

Also of note, AFI 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*)

When this case started processing, Applicant did not have over 18 years of service. The statute states an enlisted member shall be retained when “on the date on which the member is to be discharged is within two years of qualifying for retirement.” The “date on which the member is to be discharged” is not the original date on which the enlistment was to expire. The member’s expiration of term of enlistment does not stop the clock for determining when the member meets the statutory threshold. Rather, that date on which the member is to be discharged is the date after which the member has out-processed and (generally) on which he or she received his or her Department of Defense Form 214, *Certificate of Release or Discharge from Active Duty*. Accordingly, since Applicant currently has over 18 years of service, he receives the protection of 10 U.S.C. § 1176(a).

The command chain’s justification is understandable, as Applicant has engaged in many instances of misconduct over the last two years. That said, Applicant has been denied reenlistment, and he requested an exception to policy. He has completed over 18 years of service. Based on a plain reading of the statute, A1PP must grant the requested exception to policy.

Additionally, “[a]s 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*,<sup>4</sup> 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 to a discharge board<sup>5</sup> and lengthy service consideration.<sup>6</sup>

### ***Conclusion***

We recommend AF/A1PP approve the exception to policy, retaining Applicant to his minimum eligibility date. As explained above, a clear reading of the statute directs granting the exception to policy. The determination to retain Applicant does not prevent the commander from initiating discharge if the commander determines discharge is appropriate.

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<sup>4</sup> 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.

<sup>5</sup> AFI 36-3208, paragraph 6.2.2.1, 6.2.2.2.

<sup>6</sup> AFI 36-3208, Section 6F.