OpJAGAF 2018/5, 25 July 2018, **ACCELERATED RETIREMENT UNDER 10 U.S.C. §12731b**

This is in response to your question whether approving an accelerated longevity retirement under 10 U.S.C. §12731b is a lawful "collateral determination" a Personnel Board can make when considering appeal from an unchallenged physical-disability-retirement determination of the Formal Physical Evaluation Board.

Factual Background

The Member is a Reserve officer who as of the date of this Opinion had earned 17 years of creditable service. In July 2015, the Member was diagnosed with a serious medical condition, which triggered a Formal Physical Evaluation Board. The Board found the Member unfit because of physical disability, and recommended permanent retirement with a disability rating of 30 percent.

The Member appealed this decision to the Secretary of the Air Force Personnel Council. In his appeal, Member contends that his eligibility for retirement should not be physical disability alone as he has met the statutory requirements for a longevity-based retirement. Thus, the Member asks that the Secretary of the Air Force provide him a "20-year Letter" pursuant to Title 10, United States Code, Section 12731(d), signifying that he has "completed the years of service required for eligibility for retired pay…." The Member asserts that such an action is a "collateral determination" the Personnel Council is authorized to make.

Standards

A reserve member of the Air Force is entitled to retirement pay, starting generally at 60 years of age, after having performed 20 years of creditable military service. *See* 10 U.S.C. §12731(a)(2), (f)(1). If that member has completed at least 15 years of creditable service, but "no longer meets the qualifications for membership in the Selected Reserve solely because the member is unfit because of physical disability," the Secretary may in essence advance that member to the 20-year mark and allow a longevity retirement under §12731(a)(2). *See* 10 U.S.C. §12731b(a). In full, §12731b states:

> (a) In the case of a member of the Selected Reserve of a reserve component who no longer meets the qualifications for membership in the Selected Reserve solely because the member is unfit because of physical disability, the Secretary concerned may, for purposes of section 12731 of this title, determine to treat the member as having met the service requirements [subsection 12731(a)(2)] and provide the member with the notification required by [subsection 12731(d)][1] if the member has completed at least 15, and less than 20, years of service computed under section 12732 of this title.

[1] This is the "20-year letter" reference: "(d) The Secretary concerned shall notify each person who has completed the years of service required for eligibility for retired pay under [§12731]."

(b) Notification under subsection (a) may not be made if—
(1) the disability was the result of the member's intentional misconduct, willful neglect, or willful failure to comply with standards and qualifications for retention established by the Secretary concerned; or
(2) the disability was incurred during a period of unauthorized absence.

The exceptions of §12731b(b) do not apply in this case. Thus, in the normal course, with the Formal Physical Evaluation Board's finding that the Member is "unfit because of physical disability" and as he "has completed at least 15, and less than 20, years of service," the Secretary has the legal authority to approve the Member's longevity retirement.

The Secretary is not required to act personally however. While the Secretary is the Retirement Approval Authority for "retirement and transfer to the retired reserve," Air Force Instruction 36-3203, *Service Retirements,* 20 Aug 2017, paragraph 1.5. authorizes delegation of that authority to the Director, Secretary of the Air Force Personnel Council. The Secretary has in fact authorized this delegation, as relevant here expressly to longevity retirements and retirement and separation for physical disability. *See* Headquarters Air Force Mission Directive 1-24, *Assistant Secretary of the Air Force (Manpower and Reserve Affairs)*, 15 December 2008, para 4 (Atch 1: A1.31, A1.32); SAF/MR Memorandum of Assistant Secretary of the Air Force (Manpower and Reserve Affairs), *Re-delegation of Authority for Individual Personnel Actions,* 12 April 2010.[2]

Consistent with these delegations, Air Force Instruction 36-2023, *The Secretary of the Air Force Personnel Council and the Air Force Personnel Board*, 8 March 2017, expressly provides authority for the Personnel Board to "consider cases of, or requests by":

2.1.7. Air Force members who are considered for retirement or separation due to physical disability (Title 10 U.S.C. chapters 61 and 69; and AFI 36-3212).
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2.1.9. An Air Force member being considered for involuntary administrative separation, and the discharge, retirement, or transfer to the retired reserve, when the individual:

2.1.9.1. Is physically unfit for further military service; or
2.1.9.2. Has applied and is eligible for length of service retirement.

And in so doing, Air Force Instruction 36-3212**,** *Physical Evaluation for Retention, Retirement, and Separation,* 27 Nov 2009, paragraph 5.9.4. expressly authorizes the Personnel Board when reviewing such a disability case to, in addition to other specific options, "[d]irect some other disposition of the case, if not specifically prohibited by law."

[2] Atch 2 paragraph 10.f. ("The Director and Deputy Director, Secretary of the Air Force Personnel Council are delegated authority to act on "[a] member's application for voluntary retirement or transfer to the retired reserve in any case not otherwise provided for in this Direction") and paragraph .9.h. ("The Director and Deputy Director, Secretary of the Air Force Personnel Council are delegated authority to act on "[a] member's retirement or separation for physical disability when under the controlling regulation, directive or instruction, *Personnel Board consideration is required."*)

In addition to those matters expressly delegated, the *Re-delegation of Authority* memorandum authorizes the Personnel Council and Personnel Board to make lawful "collateral determinations" necessary to fully execute the authority delegated:

> The decision in some matters covered by this Direction may necessitate a collateral determination. Collateral determinations include, but are not limited to, determination of the highest grade satisfactorily held by the affected member, whether to waive or reduce the member's active duty service commitment, whether to reduce the number of years of commissioned service needed to retire as an officer, and whether to recoup from the member the unearned portion of special pays, bonuses, and the cost of advanced education or training. Except as otherwise required by law, DOD policy, or an express provision of this Direction or a re-delegation under it, the delegation and/or re-delegation under this Direction of authority to decide any matter includes the authority to make any such related collateral determinations. The exceptions to this general collateral determination authority include paragraphs 8.m., and 10.c.. In addition, the authority to make such collateral determinations may be separately withdrawn under paragraph 3.

Re-delegation of Authority Memorandum, Atch 2, paragraph 5.a.

Analysis

When reviewing a disability case, the Personnel Board is expressly authorized to direct any outcome as long as it is not "specifically prohibited by law." AFI 36-3212, para 5.9.4. Here, there is no legal impediment to the Board accelerating the Member's service date to the 20-year mark and allowing him a longevity retirement. In fact, in these circumstances, such an outcome is expressly contemplated and authorized by law--10 U.S.C. §12731b(a)--and appropriately delegated by the Secretary.

Even more specifically, the Board possesses the delegated power to consider the retirement case of a member who "[i]s physically unfit for military service," when that member (1) has applied and (2) is eligible for length-of-service retirement. AFI 36-2023, para 2.1.9. Here, application of §12731b(a) allows the Member to satisfy clause (2) for "eligible for length of service retirement." While arguably the Member has not satisfied clause (1) by having in the formal sense applied through the established Air Force Personnel Center process, he has made the longevity-retirement request as part of his appeal. To not consider the request because of the manner by which the Member submits it would exalt form over substance. Generally, administrative rules should not be interpreted in a manner that exalts form over substance.[3]

This interpretation--that the Board has direct authority to act on the Member's longevity-retirement request--renders unnecessary an examination of the Board's authority to take the same action under its catch-all "collateral determination" power. But such an examination would lead to the same result.

[3] *See, e.g., City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999); *Strom v. United States*, 641 F.3d 1051 (9th Cir 2011).

Pursuant to AFI 36-2023, paragraph 2.1.7., the Board here is directly reviewing the case of a member who is being "considered for retirement … due to physical disability" who has more than 15 years of creditable service. On these facts, pursuant to §12731b(a), a lawful result regardless of the mechanism that allows the Board to arrive at it would be granting the Member a longevity-based, rather than medically-based, retirement. By determining that the Formal Physical Evaluation Board's finding that the Member is "unfit because of physical disability" was correct (and here no one challenges that it is not), the question before the Board becomes whether a medical retirement is the "right" one. Another lawful disposition, such as a longevity-based retirement, may be "collateral," but it has a rational nexus to the factual predicate before the Board. It is not substantially different than considering the medical-retirement case of a member who has served 13 years as an enlisted member and seven as an officer, and the Board deciding that the particular circumstances require "reduc[ing] the number of years of commissioned service needed to retire as an officer," as the appropriate disposition. The action here is little different than that action and that action is expressly authorized by the *Re-delegation of Authority* memorandum.

In essence, the direct authority under AFI 36-3212**,** paragraph 5.9.4. (to make any "other disposition of the case, if not specifically prohibited by law") and the Board's "collateral determination" power under the *Re-delegation of Authority* memorandum are concurrent. Reliance on either allows the Board to grant the Member's request for a longevity-based retirement vice a medical one.

One additional statutory interpretation deserves discussion. Section 12731b is titled: "Special rule for members with physical disabilities not incurred in line of duty" (emphasis added). And the sparse legislative history of §12731b likewise suggests that the intent of the statute was to allow the reserve-component, longevity retirement for unfitting conditions "not incurred or aggravated in the line of duty."[4] A reasonable interpretation of these sources is that the intent of the statute is that it is to apply only to unfitting conditions resulting from a non-duty-related cause--in other words, if the member suffered the unfitting condition in the line of duty (as occurred here) then the special rule of §12731b does not apply.

But that is not what the text of the statute says. The plain language of §12731b is clear in its application--a reserve component member who "has completed at least 15, and less than 20, years of service" and "is unfit because of physical disability," without limitation as long as the cause of that disability is not excluded by subsection (b)(generally misconduct), may be granted a longevity retirement. And because this language is plain, statutory construction ends there. The Supreme Court has long held that statutory construction necessarily begins and may end "with the language of the statute itself. … If the statute's language is plain, 'the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms.'"[5] Intrinsic aids to construction, such as headings and captions and legislative history, are only useful

[4] "In the case of a reserve component member, the section would qualify the member for retirement with at least 15 but less than 20 years of service when the member is disqualified for military service due to a medical condition that was not incurred or aggravated in the line of duty." 106 H.Rept 175, Part B, No 29 (June 8, 1999). This is true as this is the impact of §12731b, though as discussed the language also would qualify the member for retirement when the medical condition was incurred or aggravated in the line of duty.

[5] *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S. Ct. 2297, 85 L. Ed. 2d 692 (1985)); *see also State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 699 (1st Cir. 1994) ("In the game of statutory interpretation, statutory language is the ultimate trump card.").

when statutory language is ambiguous.[6] Or as the Supreme Court more eloquently explained in *Trainmen v. Baltimore & Ohio R.R.*:

> Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner …. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.[7]

Whether it was intended or not, the statutory language of §12731b is plain on its face and the application of that plain language is eminently reasonable, certainly not absurd. Thus, reference to §12731b's title or the scant legislative history is unnecessary. It says what it says and should be applied as it says.

Conclusion

The Personnel Council has the direct authority to grant a longevity retirement under AFI 36-3212**,** paragraph 5.9.4 in this case and concurrently the authority to do the same as a "collateral determination."[8] While doing so is discretionary, there is no legal limitation on taking that action.

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[6] See 2A Sutherland *Statutory Construction* §47:1 (7th ed.) ("[I]ntrinsic aids generally are the first resource to which courts turn to construe an ambiguous statute."); §47.03 (the title of a statute should be considered only when the language of the law is ambiguous).
[7] 331 U.S. 519, 528-29 (1947)("matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles.")
[8] Members are only entitled to one service (longevity) or disability retirement. *See* 38 U.S.C. §5304.