

OpJAGAF 2018/13, 25 July 2018, RESERVE ENLISTED RETIREMENT AND “HIGHEST GRADE HELD SATISFACTORILY”

This is in response to your question whether the “highest grade held (HGH) satisfactorily” process of then-applicable Air Force Instruction 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 Apr 05), paragraph 5.14.8.¹ allowed the Secretary to retire a reserve enlisted member at a grade lower than that which the member would have held on his retirement date absent application of the HGH process.

Factual Background

As we understand the facts, due to High Year Tenure rules MSgt B was scheduled to retire on 1 May 2007 after more than 30 years of service as a Marine Corps, Army, and Air Force enlisted member. In August or September 2006, MSgt B used marijuana, which was discovered during a random urinalysis.

On 29 Jan 07, MSgt B’s Readiness Management Group Commander (RMG/CC) issued him a Letter of Reprimand (LOR) and recommended that he be administratively discharged for “[d]rug abuse.” On 22 Feb 07, RMG/CC signed a memorandum notifying MSgt B that, due to his projected 1 May 07 retirement date, she was initiating a “Highest Grade Held (HGH) Determination” pursuant to AFI 36-3209, para 5.14.8. MSgt B acknowledged receipt of all these documents on 5 and 6 Mar 07 and noted his intention to attach comments and documents in response. In his response to the LOR, MSgt B admitted to one-time use of marijuana.

On 26 Apr 07, the Director of the Secretary of the Air Force Personnel Council, on behalf of the Secretary, found that MSgt B “did not serve satisfactorily in his current grade of Master Sergeant (E-7) and is ordered transferred to the retired reserve in the lower grade of Technical Sergeant (E-6).” TSgt B retired on 1 May 07. He now seeks relief, in the form of restoration of the grade of master sergeant, from the Air Force Board for Corrections of Military Records.

Law and Analysis

As noted above, the question before us is whether a retiring reserve enlisted member can be retired at a grade lower than their then-current grade after a “determination of highest grade held (HGH) satisfactorily” made pursuant to AFI 36-3209, para 5.14.8. The answer to that question is no.

Title 10, United States Code, Section 8961(b) provides that “a Regular or Reserve of the Air Force ... who retires other than for physical disability retires in the regular or reserve grade that he holds on the date of his retirement.” At the time of then-MSgt B’s retirement, AFI 36-3209 implemented this statutory provision as follows:

¹ AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, 14 April 2005, was superseded by AFI 36-3203, *Service Retirements*, 18 September 2015.

5.14.8. Enlisted Retired Grades. Enlisted reservists who retire, other than for physical disability, retire in their current grade. A determination of highest grade held (HGH) satisfactorily is required for all members who apply for transfer to the Retired Reserve. HQ AFPC has been delegated this authority from SAF. The SAF is required to approve any grade lower than the HGH. (*emphasis added*)

Subsequently, AFI 36-3203, *Service Retirements* (18 Sep 15) superseded AFI 36-3209. The new paragraph implementing 10 U.S.C. §8961 states:

8.9.6. Enlisted Retired Grades. Enlisted members who retire with a Reserve Retirement, other than for physical disability, retire in their current grade. If a member at retirement holds a grade lower than one previously held, a determination of highest grade held satisfactorily is required unless the member satisfactorily held a higher grade than the current retirement. SecAF has delegated this authority to HQ ARPC. The SecAF is required to approve any grade lower than the highest grade held. (*emphasis added*)

The phrase “highest grade held satisfactorily” is a creature of statute. Title 10, United States Code, Section 8963, explains:

(a) A Reserve enlisted member of the Air Force described in subsection (b) who is retired under section 8914 of this title shall be retired in the highest enlisted grade in which the member served on active duty satisfactorily ... as determined by the Secretary of the Air Force.

(b) This section applies to a Reserve enlisted member who—(1) at the time of retirement is serving on active duty ... in a grade lower than the highest enlisted grade held by the member while on active duty ...; and (2) was previously administratively reduced in grade not as a result of the member’s own misconduct, as determined by the Secretary of the Air Force.

(c) This section applies with respect to Reserve enlisted members who are retired under section 8914 of this title after September 30, 1996.

Section 8963 does not provide for an enlisted member’s retired grade to be reduced for misconduct. Rather, 10 U.S.C. §8963 inures to the benefit of an enlisted member who has retired at a grade lower than the highest held during their enlistment by authorizing a process to allow that member to be restored to the higher grade.

This differs from officer retirements, for which an “officer grade determination” in conjunction with retirement can be a prerequisite to retiring at a lower grade than the highest officer grade held: “An officer is not automatically entitled to retire in the highest grade held. Instead, an officer is retired in the highest grade served on active duty satisfactorily or creditable service for ARC members retiring under §12731.” AFI 36-3203, para 7.6. This implements 10 U.S.C. §1370(a)(1) which similarly states: “[A] commission officer ... shall ... be retired in the highest grade in which he served on active duty satisfactorily, as determined by the Secretary of the military department concerned, for not less than six months.”

Here, there were (time permitting) various options to reduce MSgt B to technical sergeant prior to his retirement or to have prevented him from retiring as a master sergeant. Command could have preferred charges under Article 112a or pursued non-judicial punishment for the same. Command could have continued to pursue the administrative discharge process it began on 29 Jan 07 (which it appears command abandoned). At the time, command also had the option to administratively demote MSgt B to technical sergeant IAW AFI 36-2502, *Enlisted Airman Promotion/Demotion Programs* (12 Dec 14), Chapter 6. But command did not pursue any of these mechanisms in 2007.

Rather, command initiated the HGH process specifically to reduce MSgt B's grade at retirement from what would have been the "current grade" of master sergeant to technical sergeant. Initiating the HGH process to effectively administratively demote MSgt B was an improper use of that authority. At the time of MSgt B's retirement, Air Force officials read the language of AFI 36-3209, para 5.14.8. to provide authority to reduce MSgt B's grade at retirement--that reading was erroneous. It was inconsistent with statutory authority for the HGH process as laid out in 10 U.S.C. §8963. As noted above, §8963 authorizes the HGH process to raise, not lower, a retired member's grade and to do so for situations not involving misconduct. There is no other statutory or administrative authority to use the HGH process to lower a retired member's grade at the time of retirement. In fact, the change to the HGH language in Air Force Instruction, occasioned by AFI 36-3209, para 5.14.8. being superseded by AFI 36-3203, para 8.9.6. in September 2015, eliminated the ambiguity in the AFI 36-3209, para 5.14.8. regarding the HGH process and it now essentially mirrors the statutory language of §8963.

Absent any appropriate grade-reduction process, MSgt B would have been a master sergeant on his retirement day (1 May 07). By statute (10 U.S.C. §8961) and implementing instruction (AFI 36-3209, para 5.14.8. and AFI 36-3203, para 8.9.6.) he should have retired at that "current grade."

Conclusion

Based on the foregoing, we conclude that the application of the "highest grade held (HGH) satisfactorily" process to MSgt B's case was erroneous. That process should not have been and cannot be used to reduce his grade at the time of retirement from master sergeant to technical sergeant.