

Act apply to the application. This determination is needed only when the applicant invokes the protection of the Act, or when the question of its applicability is otherwise raised by the evidence.

(2) Whether the application was timely filed and, if not, whether the applicant has demonstrated that it would be in the interest of justice to excuse the untimely filing. When the Board determines that an application is not timely, and does not excuse its untimeliness, the application will be denied on that basis.

(3) Whether the applicant has exhausted all available and effective administrative remedies. If the applicant has not, the application will be denied on that basis.

(4) Whether the applicant has demonstrated the existence of a material error or injustice that can be remedied effectively through correction of the applicant's military record and, if so, what corrections are needed to provide full and effective relief.

(5) In Military Whistleblowers Protection Act cases only, whether to recommend to the Secretary of the Air Force that disciplinary or administrative action be taken against any Air Force official whom the Board finds to have committed an act of reprisal against the applicant. Any determination on this issue will not be made a part of the Board's record of proceedings and will not be given to the applicant, but will be provided directly to the Secretary of the Air Force under separate cover (§865.2(b)).

(m) *Record of proceedings.* The Board staff will prepare a record of proceedings following deliberations which will include:

- (1) The name and vote of each Board member.
- (2) The application.
- (3) Briefs and written arguments.
- (4) Documentary evidence.
- (5) A hearing transcript if a hearing was held.
- (6) Advisory opinions and the applicant's related comments.
- (7) The findings, conclusions, and recommendations of the Board.
- (8) Minority reports, if any.

(9) Other information necessary to show a true and complete history of the proceedings.

(n) *Minority reports.* A dissenting panel member may prepare a minority report which may address any aspect of the case.

(o) *Separate communications.* The Board may send comments or recommendations to the Secretary of the Air Force as to administrative or disciplinary action against individuals found to have committed acts of reprisal prohibited by the Military Whistleblowers Protection Act and on other matters arising from an application not directly related to the requested correction of military records. Such comments and recommendations will be separately communicated and will not be included in the record of proceedings or given to the applicant or counsel.

(p) *Final action by the Board.* The Board acts for the Secretary of the Air Force and its decision is final when it:

(1) Denies any application (except under 10 U.S.C. 1034).

(2) Grants any application in whole or part when the relief was recommended by the official preparing the advisory opinion, was unanimously agreed to by the panel, and does not involve an appointment or promotion requiring confirmation by the Senate.

(q) The Board sends the record of proceedings on all other applications to the Secretary of the Air Force or his or her designee for final decision.

§ 865.5 Decision of the Secretary of the Air Force.

(a) The Secretary may direct such action as he or she deems appropriate on each case, including returning the case to the Board for further consideration. Cases returned to the Board for further reconsideration will be accompanied by a brief statement of the reasons for such action. If the Secretary does not accept the Board's recommendation, the decision will be in writing and will include a brief statement of the grounds for denial.

(b) Decisions in cases under the Military Whistleblowers Protection Act. The Secretary will issue decisions on such cases within 180 days after receipt

§ 865.6

of the case and will, unless the full relief requested is granted, inform applicants of their right to request review of the decision by the Secretary of Defense (SecDef). Applicants will also be informed:

(1) Of the name and address of the official to whom the request for review must be submitted.

(2) That the request for review must be submitted within ninety days after receipt of the decision by the Secretary of the Air Force.

(3) That the request for review must be in writing and include the applicant's name, address, and telephone number; a copy of the application to the AFBCMR and the final decision of the Secretary of the Air Force; and a statement of the specific reasons the applicant is not satisfied with the decision of the Secretary of the Air Force.

(4) That the request must be based on the Board record; requests for review based on factual allegations or evidence not previously presented to the Board will not be considered under this section but may be the basis for reconsideration by the Board under § 865.6.

(c) Decisions in cases filed under Section 507, Public Law 103-160. The Secretary will issue a decision within 60 days of receipt of the case of an officer who:

(1) Was offered the opportunity to be discharged or separated from active duty under the Voluntary Separation Incentive (VSI) or Special Separation Benefit (SSB) programs,

(2) Elected not to accept such discharge or separation,

(3) Was thereafter discharged or separated from active duty, after September 30, 1990, as a result of selection by a board convened to select officers for early separation (a "RIF board"),

(4) Files an application with the Board within two years of the date of separation or discharge, or one year after March 1, 1996, whichever is later, alleging that the officer was not effectively counseled, before electing not to accept discharge or separation under the VSI/SSB programs, concerning the officer's vulnerability to selection for involuntary discharge or separation ("RIF"), and

(5) Requests expedited consideration under this section.

32 CFR Ch. VII (7-1-05 Edition)

(d) Upon finding of ineffective counseling, the Secretary will provide the officer with an opportunity to participate, at the officer's option, in the VSI or SSB programs or, if eligible, in an early retirement program.

(e) In cases under §§ 865.5(b) and 865.5(c) which involve additional issues not cognizable under those sections, the additional issues may be considered separately by the Board under §§ 865.3 and 865.4. The special time limits in §§ 865.5(b) and 865.5(c) do not apply to the decision concerning these additional issues.

§ 865.6 Reconsideration of applications.

The Board may reconsider an application if the applicant submits newly discovered relevant evidence that was not available when the application was previously considered. The Executive Director will screen each request for reconsideration to determine whether it contains new evidence.

(a) If the request contains new evidence, the Executive Director will refer it to a panel of the Board for a decision. The Board will decide the relevance and weight of any new evidence, whether it was reasonably available to the applicant when the application was previously considered, and whether it was submitted in a timely manner. The Board may deny reconsideration if the request does not meet the criteria for reconsideration. Otherwise the Board will reconsider the application and decide the case either on timeliness or merit as appropriate.

(b) If the request does not contain new evidence, the Executive Director will return it to the applicant without referral to the Board.

§ 865.7 Action after final decision.

(a) *Action by the Executive Director.* The Executive Director will inform the applicant or counsel, if any, of the final decision on the application. If any requested relief was denied, the Executive Director will advise the applicant of reconsideration procedures and, for cases processed under the Military Whistleblowers Protection Act, review by the SecDef. The Executive Director will send decisions requiring corrective