

THIRD ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2015-05096

XXXXXXXXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Board reconsider his request for special board (SB) consideration for the CY11A Major Selective Continuation Board.

RESUME OF THE CASE

The applicant is a former Air Force major (O-4).

On 30 Nov 11, he was honorably discharged with a narrative reason for separation of "Non-Selection, Permanent Promotion." He was credited with 15 years, 5 months, and 25 days of active duty service.

Per ARPC IMT 92, *Appointment Order*, dated 12 Mar 13, the applicant was appointed in the rank of major in the Air Force Reserve on 1 Dec 11.

On 12 Jul 12, the Board (BC-2011-04308) granted the applicant's request his letter of reprimand (LOR) dated 21 May 09, unfavorable information file (UIF), his referral officer performance report (OPR) ending 4 Jun 09 and promotion recommendation form (PRF) be removed from his record and he be considered by a special selection board (SSB) for the CY10A and CY11A Lieutenant Colonel Central Selection Boards (CSB). It was further recommended he be reinstated on active duty should he be selected for promotion by the SSB. The Board concluded there was sufficient doubt as to the propriety of the LOR based on mitigating factors. While the applicant acknowledged the prohibition of sharing passwords, it was determined the form he signed did not apply to him since it was a contractor form. The Board found evidence that the applicant's leadership condoned the sharing of passwords due to mission requirements. The Board also noted the applicant passed a polygraph test indicating there was no deception regarding whether his leadership was aware of and condoned the practice of sharing of passwords with contractors. The Board concluded it was unjust to single out the applicant for punishment and noted the incident did not result in any security breach. The applicant was considered for SSB for the CY10A and CY11A Lieutenant Colonel CSBs and was not selected for promotion.

On 12 Apr 13, the applicant requested he be granted SB consideration for selective continuation in the grade of major (BC-2013-02970). In a letter dated 21 Jun 13, AFPC/DPSOO informed the applicant his request was administratively corrected and did not require review by the Board. The applicant was granted SB consideration for the CY11A Major LAF Selective Continuation Board.

The applicant was assured the record meeting the board would not contain the referral OPR removed by the AFBCMR. The applicant was not selected for continuation by the SB.

Per ARPC/DPT memorandum dated 21 Aug 14, the applicant was notified of his second deferral for promotion to lieutenant colonel (O-5) in the Air Force Reserve and as a result, he would be discharged from the Air Force Reserve. His mandatory separation date (MSD) was established as 1 Jun 16.

On 15 Jun 17 and 6 Dec 17, the Board considered and partially granted his initial request in BC-2015-05096. The Board directed his PRF for the CY10A Lieutenant Colonel CSB be removed and be replaced with the provided PRF, and he be considered by an SSB for the CY10A Lieutenant Colonel CSB. However, the Board recommended denial for removal of the OPR for the period ending 1 Jun 10 finding insufficient evidence his duty title "Special Assistant" implied he was a mediocre performer or that there was an error in his rating chain. The Board also denied the request for a direct promotion to lieutenant colonel. The Board disagreed with counsel that a direct promotion was the only reasonable solution and noted the applicant's case was not similar to the cited cases.

On 26 Mar 19, the applicant requested reconsideration for an SSB for the CY10A Lieutenant Colonel CSB so he may write a letter to the promotion board (BC-2015-05096-2). On 30 Jul 19, AFPC/DP2SPP informed the applicant they were able to administratively correct his record for SSB consideration for the CY10A Lieutenant Colonel CSB. The applicant was considered by the SSB and was not selected for promotion.

On 29 Jul 20, the applicant requested reconsideration for selective continuation for the CY11A Major Selective Continuation Board and he receive a direct promotion to the rank of lieutenant colonel (BC-2015-05096-3). He contended he was falsely accused of a security violation in 2009. While vindicated by the Air Force Central Adjudication Facility (AFCAF), there were lasting impacts. After two AFBCMR requests (BC-2011-04308 and BC-2015-05096) that ruled in his favor, the corrections ultimately provided no relief. He was denied continuation in the rank of major, in violation of DODI 1320.08, *Continuation of Commissioned Officers on Active Duty and on the Reserve Active Status List*, per the Court of Appeals Federal Court (CoAFC) ruling in 2020. On 15 Jun 21 and 25 Mar 22, the Board denied the applicant's request. The Board did not find the applicant was similarly situated as the plaintiff in *Baude v. United States*. The Board found the applicant was previously made whole with corrections to his records, to include removal of an LOR, OPR and PRF. Further the applicant was considered for promotion to lieutenant colonel by an SSB and continuation in the rank of major as a result of the AFBCMR directed corrections and administrative corrections of his record by AFPC/DP2SP. The Board also noted it was without authority to grant the applicant a direct promotion to the rank of lieutenant colonel.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letter and Record of Proceedings at Exhibit T.

On 22 Mar 23, Counsel, on behalf of the applicant requested reconsideration for SB for selective continuation for the CY11A Major Selective Continuation Board. The case is pending Administrative Procedure Act (APA) review and the proceedings have been stayed by agreement of the parties and the Court. The CoAFC concluded the Secretary of the Air Force (SecAF) Memorandum of Instruction (MOI) to the CY11A Major Selective Continuation Board narrowing the continuation window from within six years of retirement to within five years of retirement violated DODI 1320.08. The applicant requested the Board apply the law as announced in *Baude v. United States*; however, the Board ruled the *Baude* ruling did not apply to him. However, the Board has applied the law of *Baude* to plaintiffs similarly situated to him and cites BC-2017-00002 and BC-2013-04214-3. The Board granted relief for SB for the CY11A Major Selective continuation Board in these cases. The Board must treat similarly situated cases alike and

consistently interpret and apply federal caselaw. To do otherwise, would be arbitrary and violate the APA. In an order filed 21 Mar 23, the United States District Court for the District of Maryland granted the applicant's motion to stay proceedings and remanded the case to the AFBCMR for reconsideration.

The applicant's complete submission is at Exhibits U and V.

Counsel cites BC-2017-00002-2 and BC-2013-04214-3 as precedent to grant the applicant's request for SB consideration for the CY11A Major Selective Continuation Board. The Board granted the cited cases finding the applicants in these cases were similarly situated as the plaintiff in *Baude v. United States*. Like the plaintiff in *Baude v. United States*, the applicants were discharged after not being selected for continuation by the CY11A Major Selective Continuation Board and there were no "unusual circumstances" pertaining to their records. Accordingly, the Board granted SB consideration for the CY11A Selective Continuation Board with memorandum of instruction (MOI) that majors within six years of retirement shall be continued, if determined that continuation was in the best interest of the Air Force.

APPLICABLE AUTHORITY/GUIDANCE

Baude v. United States:

On 9 Apr 20, the CoAFC issued an opinion (*Baude v. United States*) that the named plaintiff demonstrated the AFBCMR's decision in denying him SB for continuation in the rank of major was arbitrary, contrary to law and unsupported by substantial evidence. The plaintiff was not selected for continuation by the CY11A Major Selective Continuation Board. He was within 6 years of qualifying for a length of service retirement; however, the SecAF's modified memorandum of instruction (MOI) to the board narrowed the window for continuation to officers within 5 years of retirement instead of 6 years. The CoAFC vacated the CoFC's earlier opinion for judgment in favor of the Government and reversed the denial of the plaintiff's cross-motion for summary judgment. The CoAFC concluded the SecAF's instructions to the continuation board did in fact violate DODI 1320.08, *Continuation of Commissioned Officers on Active Duty and on the Reserve Active Status List*, because the SecAF lacked the authority to re-write the regulation or narrow the protective window or disregard the regulatory presumption in favor of continuation. It stated an officer in the Air Force who holds the grade of O-4 must appear before a promotion board to receive further promotion per 10 U.S.C. §§ 611a and 628(k). An officer who otherwise would be discharged for nonselection of promotion may nevertheless remain in active service if a continuation board selects them for continuation per 10 U.S.C. §§ 611 and 637. A commissioned officer on the active duty list (ADL) in the grade of O-4 shall normally be selected for continuation if the officer will qualify for retirement within 6 years of the date of continuation. The Secretary of the Military Department in unusual circumstances, such as when an officer's personnel record contains derogatory information may be discharged involuntarily. In this case there were no unusual circumstances. The case was remanded to the AFBCMR to convene a SB for reconsideration of the plaintiff's non-continuation through a process consistent with DODI 1320.08. On 23 Nov 20, the CoAFC informed the AFBCMR of the Order. Due to the CoAFC Order directing the Air Force convene a SB for the plaintiff rather than remanding the plaintiff's request for reconsideration by the AFBCMR, the applicant's case was not considered by the AFBCMR. Instead, on 25 Mar 21, the plaintiff was considered by a SB convened at AFPC for the CY11A Major Selective Continuation Board.

FINDINGS AND CONCLUSION

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board remains unconvinced the evidence presented demonstrates an error or injustice. Counsel contends the applicant is similarly situated as the plaintiff in *Baude v. United States* and cites BC-2017-00002-2 and BC-2013-04214-3 as precedent to grant the applicant's request. However, the Board finds the applicant is not similarly situated as the plaintiff in *Baude v. United States* or the applicants in the cited cases. In view of the CoAFC ruling in *Baude v. United States*, the Board has granted requests for SB for the CY11A Major Selective Continuation Board for similarly situated applicants. Like the plaintiff, the records of these applicants contained "no unusual circumstances." The evidence clearly demonstrated their nonselection for continuation was based on the SecAF MOI to the CY11A Major Selective Continuation Board narrowing the continuation window from within six years to within five years from retirement, which the CoAFC found to have violated DODI 1320.08. However, unlike the plaintiff and the applicants in the cited cases, this applicant received prior AFBCMR and administrative corrections for removal of unfavorable personnel actions and both SB and SSB consideration. While the applicant contends the previous corrections failed to make him whole, the Board finds insufficient evidence to warrant relief on the basis he is similarly situated as the plaintiff in *Baude v. United States*. Therefore, the Board recommends against correcting the applicant's records.

RECOMMENDATION

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

CERTIFICATION

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2015-05096-4 in Executive Session on 20 Apr 23:

, Panel Chair
, Panel Member
, Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit T: Record of Proceedings, w/ Exhibits A-S, dated 21 Apr 22.
Exhibit U: Application, DD Form 149, w/atchs, dated 22 Mar 23.
Exhibit V: Remand Order, United States District Court for the District of Maryland,
(Civil Action No. DKC 23-5), Filed 21 Mar 23.
Exhibit W: Documentary evidence, including relevant excerpts from official records.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.