ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF: XXXXXXXXXXXX

DOCKET NUMBER: BC-2016-05068-2

COUNSEL: XXXXXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider his request he be considered by a special board (SB) for selective continuation by the CY11A Major Selective Continuation Board.

He also makes the following new requests:

1. He receive back pay, entitlements, retirement benefits, credits, bonuses and any other damages not specifically listed.

2. He be reimbursed attorney's fees pursuant to the Equal Access to Justice Act.

RESUME OF THE CASE

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

On 30 Nov 11, the applicant was honorably discharged from the Regular Air Force in the rank of major with a narrative reason for separation of "Non-selection, Permanent Promotion." He was credited with 15 years, 4 months and 23 days of active duty service.

On 19 May 17, the Board denied the applicant's request for SB consideration for the CY11A Major Selective Continuation Board. The Board found the applicant repeated the arguments of his co-plaintiffs, who timely submitted their applications, challenging the CY11A Major Selective Continuation Board. The Board concluded the Secretary of the Air Force (SecAF) acted within the limits of his authority in the instructions provided to the continuation board in changing the timeframe for continuation from six years to five years in order to qualify for retirement. While counsel challenged the need for the Air Force to reduce Air Force end strength as an unusual circumstance to narrow the continuation timeframe, the Board noted Congress anticipated that under unusual circumstances it may not be possible to continue officers in the rank of major to 20 years of service and possible retirement. The Board concluded it was within the SecAF's prerogative to narrow the continuation timeframe. The Board also found the applicant's request was not timely filed and it was not in the interest of justice to waive the untimeliness.

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 F.

On 2 Feb 22, counsel, on behalf of the applicant, requested reconsideration of his case. His discharge was due to the unlawfully implemented, SecAF's supplementary instructions that changed the standard applied to selective continuation decisions. Had the proper standard been applied, the applicant would have qualified for selective continuation. The supplementary instructions were unlawful because the SecAF lacked the authority to modify DODI 1320.08,

Continuation of Commissioned Officers on Active Duty and on the Reserve Active Status List. The SecAF's new instructions violated DODI 1320.08, which states an officer within six years from retirement shall normally be selected for continuation; however, the officer might still be discontinued if there is some "unusual circumstance" such as derogatory information in their file. The SecAF's instruction violated DODI 1320.08 by decreasing the protective threshold from six years to five years.

On 9 Apr 20, the Court of Appeals for the Federal Circuit (CoAFC) reversed the Court of Federal Claims (CoFC) decision and ruled the SecAF lacked the authority to modify DODI 1320.08. On 23 Oct 20, the CoAFC issued a formal mandate of relief for the plaintiff in *Baude v. United States* and the Air Force convened an SB for the plaintiff on 25 Mar 21.

The decision of the AFBCMR to non-continue the applicant and similarly situated officers was arbitrary, contrary to law and unsupported by substantial evidence. The applicant and other officers deserve a system that follows its own rules and a reviewing forum that does more than rubber-stamp the actions of military officials.

The applicant's complete submission is at Exhibit G.

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 six 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 five years of retirement instead of six 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 six 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 discharge the officer involuntarily. In this case there were no unusual circumstances. The plaintiff's case was remanded to the AFBCMR to convene an SB for selective continuation with a process consistent with DODI 1320.08. On 23 Nov 20, the CoAFC informed the AFBCMR of the Order. Per the CoAFC order, the plaintiff's case was not reconsidered by the AFBCMR but instead the Air Force convened an SB on 25 Mar 21 for the CY11A Major Selective Continuation Board.

The CY21A Selective Continuation SB convened on 25 Mar 21. The Memorandum of Instruction (MOI) states "This special board will consider officers for selective continuation in place of the CY11A Major LAF Selective Continuation Board, and will in addition to using the specific highlighted MOI used by the original board, the following guidance will apply: Majors who will

qualify for retirement within six years of the date of continuation (1 Dec 11) shall normally be continued."

AFI 36-2501, *Officer Promotions and Selective Continuation*, Determining Continuation Period, paragraph 7.11.2 Continue majors until the last day of the month in which he or she is eligible to retire as an officer (normally upon completion of 20 years of total active military service). Majors who possess critical skills may not be continued any longer than the last day of the month in which they complete 24 years of active commissioned service.

10 U.S.C. § 1558(c)(1) Relief Associated with Correction of Certain Actions. The Secretary of the Military Department concerned shall ensure that an involuntarily board separated person receives relief under paragraph (2) or under paragraph (3) if the person, as a result of a correction of the person's military records becomes entitled to retention on or restoration to active duty or to active status in a Reserve component.

10 U.S.C. § 1558(c)(3)(A), If an involuntarily board separated person in paragraph (1) does not consent to restoration of status, rights and entitlements under paragraph (2), the Secretary concerned shall pay that person back pay and allowances (less appropriate offsets) and shall provide that person service credit.

5 U.S.C. § 5533, Dual Pay from More than One Position, an individual is not entitled to receive basic pay from more than one federal position. Receipt of military retired pay is exempt. In view of this, the applicant cannot be paid for active duty service and service in the ANG for the same period.

AFI 36-2603, *Air Force Board of Corrections to Military Records (AFBCMR), paragraph 7.2.4, Payment of Expenses*, the Air Force has no authority to pay expenses of any kind incurred by or on behalf of an applicant in connection with a correction of military records under 10 U.S.C. §1034 or 1552.

AIR FORCE EVALUATION

AFPC/JA states if the AFBCMR believes the principles articulated in *Baude v. United States* apply to the applicant's case, the Board may grant his request and direct he meet another selective continuation board utilizing the standard of six years from retirement vice five years. If on the other hand, the AFBCMR does not believe the principles articulated in *Baude v. United States* apply, they may deny his request for relief.

The applicant is one of 157 majors who met and were not selected for continuation by the CY11A Major Selective Continuation Board. This followed the second nonselection for promotion to lieutenant colonel by the CY11A Lieutenant Colonel Line of the Air Force (LAF) Central Selection Board (CSB). As a consequence, he was separated from the Air Force on 30 Nov 11. The applicant is requesting SB consideration in light of the CoAFC ruling in *Baude v. United States*. Specifically, the applicant requests to meet another SB utilizing the standard of six years from retirement vice five years.

In 2013, most of the 157 majors not selected for continuation by the CY11A Major LAF Selective Continuation Board filed for relief through the AFBCMR. The Air Force position at that time was that SecAF's decision to modify the selective continuation window from within six years of retirement to five years was within law, DOD, and Air Force boundaries. The AFBCMR agreed and denied relief to all applicants. Thereafter, several of the applicants filed for relief in the CoFC. In Apr 18, that court issued its opinion, confirming the AFBCMR's decisions to deny relief. The court ruled the SecAF possessed the discretion to alter the continuation requirements and did so lawfully. Thereafter, one applicant appealed on behalf of himself and the other applicants to the

CoAFC. In Apr 20, that court issued its opinion *(Baude v. United States),* rejecting the AFBCMR's decisions to deny relief. The court ruled the SecAF did not possess the discretion to alter the continuation requirements and thus, the court sent the case back to the AFBCMR, with instructions to convene an SB for reconsideration of the plaintiff's non-continuation, utilizing the standard of six years from retirement vice five years.

The CoAFC in *Baude v. United States* specifically limited its opinion to the plaintiff because as a non-attorney, he was unable to represent or assert rights on behalf of other parties; thus, the AFBCMR is not bound to consider any other applicant for reconsideration. The applicant argues he should be treated the same as the plaintiff. With the plaintiff, the AFBCMR had no choice but to convene an SB for reconsideration of his noncontinuation. With the applicant, the AFBCMR has a choice.

The complete advisory opinion is at Exhibit I.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 18 May 22 for comment (Exhibit J). In a response dated 2 Jun 22, counsel states the advisory opinion erroneously claims there is a relevant distinction between the plaintiff in *Baude v. United States* and the applicant because the CoAFC applied their ruling only to the plaintiff. However, because he plaintiff in *Baude v. United States* was a non-attorney, he could not legally assert rights on behalf of the other plaintiffs. As a result, he was the only person awarded relief. The advisory opinion misinterprets the Court's decision in such a way that the ruling would effectively apply only to the plaintiff. A careful, good faith reading of the CoAFC's opinion demonstrates that the distinctions made by the advisory opinion are irrelevant. The CoAFC was required by law to limit their ruling because he was legally unable to represent other parties. Because the CoAFC was simply following the law, the advisory opinion is attempting to benefit from both sides of the coin. Nowhere does the CoAFC imply or otherwise state their conclusion would only apply to the plaintiff in the case. It is evident the ruling applies to all of the petitioners' claims. The advisory opinion ignores the CoAFC determined the supplementary instructions to DODI 1320.08 were unlawful.

The advisory opinion's argument that the Board does not have to reconsider the applicant's case will fail because it would erroneously deprive the applicant of their right to reconsideration under the supplementary instructions to DODI 1320.08. The AFBMCR is required to provide reconsideration under the correct interpretation of DODI 1320.08. The applicant's claims are no different than the plaintiff in *Baude v. United States*, and thus the AFBCMR is required by law to reconsider the case. The applicant must be given reconsideration for their non-continuation through a process consistent with the plain meaning of DODI 1320.08.

The applicant's complete response is at Exhibit K.

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 concludes the applicant is the victim of an error or injustice. The Board notes AFPC/JA states the Board is not bound to consider any other applicant other than the plaintiff in *Baude v. United States*; but also states the Board may grant the applicant's request he meet another selective continuation board utilizing the standard six years from retirement vice five if the Board concluded the principles articulated in *Baude v. United States* applied to the applicant. In this respect, the Board finds the applicant is similarly situated to the

plaintiff in *Baude v. United States*. Like the plaintiff, the applicant was considered but not selected for continuation by the CY11A Major Selective Continuation Board. The CoAFC concluded the SecAF's 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. Accordingly, the Board finds sufficient evidence has been presented to grant the applicant SB consideration for the CY11A Major Continuation Board. However, for the remainder of the applicant's request, the evidence presented did not demonstrate an error or injustice, and the Board therefore finds no basis to recommend granting that portion of the applicant's request. In this respect, the applicant's request for associated back pay, retirement benefits and any other entitlements is dependent on the results of the SB for continuation. Accordingly, the Board finds the request is not ripe for adjudication by the Board at this time. With respect to the request for reimbursement of attorney fees, the Board which serves on behalf of the SecAF in the correction of military records has no authority to pay expenses of any kind incurred, to include attorney fees, in connection with a request for correction of military records per 10 U.S.C. § 1034 or §1552. Moreover, the Board finds the recommended correction of the applicant's record is proper, fitting and in accordance with the CoAFC ruling in *Baude v. United States* ordering the plaintiff be considered for an SB for continuation in the rank of major. Therefore, the Board recommends correcting the applicant's records as indicated below.

4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show:

a. He be considered by a special board (SB) for continuation for the CY11A Major Selective Continuation Board.

b. The Memorandum of Instruction (MOI) language for the SB be as follows: Majors who will qualify for retirement within six years of the date of Continuation (1 Dec 11) shall normally be continued. It will normally be in the best interest of the Air Force to continue officers with critical skills. I have determined that the following skills are critical to the Air Force: RPA Operators (18X, 11U, 12U); Fighter Pilots (11F); Bomber Pilots (11B); Special Operations CSOs (12S); Combat Rescue Officers/Special Tactics Officers (13D); Catholic Chaplains (52R); Clinical Psychologists (42P); Flight Nurses (46F); and Mental Health Nurses (46P).

However, regarding the remainder of the applicant's request, the Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the application will only be reconsidered upon receipt of relevant evidence not already considered by the Board.

CERTIFICATION

The following quorum of the Board, as defined in Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2016-05068-2 in Executive Session on 3 Nov 22:

, Chair, AFBCMR
, Panel Member
, Panel Member

All members voted to correct the record. The panel considered the following:

Exhibit F: Record of Proceedings, w/ Exhibits A-J, dated 31 Jul 17.
Exhibit G: Application, DD Form 149, w/atchs, dated 2 Feb 22.
Exhibit H: Documentary evidence, including relevant excerpts from official records.
Exhibit I: Advisory Opinion, AFPC/JA, dated 5 May 22.
Exhibit J: Notification of Advisory, SAF/MRBC to Applicant, dated 18 May 22.
Exhibit K: Applicant's Response, dated 2 Jun 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9.

X

Board Operations Manager, AFBCMR