

## **ADDENDUM TO RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

XXXXXXXXXXXXXXXXXX

**DOCKET NUMBER:** BC-2011-02795-3

**COUNSEL:** NONE

**HEARING REQUESTED:** NO

### **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 requests the following new requests:

1. His promotions to the rank of lieutenant colonel (O-5) and colonel (O-6) in the Air Force Reserve be recognized if reinstated and continued on active duty, with calculation of back pay.
2. He be advised if his Reserve promotions will be recognized if restored to active duty before he exercises his option to consent or not consent to continuation.
3. If his promotions in the Air Force Reserve are not recognized, special selection boards (SSB) be convened to determine if he would have been promoted during the continuation period.
4. If not selected for promotion by the SSBs, the AFBCMR determine if he received fair and equitable consideration.
5. If not selected for promotion by the SSBs, he be continued to 24 years of service in the rank of major (O-4).

### **RESUME OF THE CASE**

The applicant is a former Air Force major (O-4) and current Air Force Reserve colonel (O-6).

On 30 Nov 11, the applicant was honorably discharged from the Regular Air Force in the rank of major for his second nonselection for promotion to lieutenant colonel.

Per ARPC IMT 92, *Appointment Order*, dated 4 Jun 12, the applicant was appointed in the rank of major in the Air Force Reserve on 1 Dec 11.

On 15 Mar 12, the Board considered and denied his request for continuation by the CY11A Major Selective Continuation Board. The Board noted the applicant's contention there was precedent that officers with at least 15 years of honorable service should not be subject to involuntary separation; however, it was outside the Board's purview to change the legally constituted policy. The Board concluded he provided no evidence to show he was treated differently than others similarly situated.

In a letter dated 29 May 13 to counsel, the AFBCMR stated the record of proceedings (ROP) adopted the Air Force offices of primary responsibility that the Secretary of the Air Force (SecAF) provided specific guidance concerning selective continuation and none of the applicant's contentions would have affected the outcome of the continuation board. As to what legal authority the Board relied upon when concluding the SecAF's actions were legally constituted policy, it stated there is a presumption of regularity in the conduct of government affairs in that officers of the government discharge their duties in accordance with law and policy.

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.

The applicant was promoted to the rank of colonel in the Air Force Reserve, with date of rank (DOR) and effective date of promotion of 1 Jul 19.

On 20 Aug 21, the applicant requested reconsideration of his request. He contends in *Baude v United States*, the Court of Appeals for the Federal Circuit (CoAFC) ruled the SecAF violated DODI 1320.08, *Continuation of Commissioned Officers on Active Duty and on the Reserve Active Status List*, when he instructed the continuation board it should not normally continue majors unless they were within five years of retirement, instead of six years from retirement. Based on the CoAFC opinion, he requests he receive SB consideration for the CY11A Major Selective Continuation Board. If selected for SB, he requests his record be corrected to show he was not discharged on 30 Nov 11 but continued on active duty and granted relief specified in 10 U.S.C. § 1558(c). The statute provides he can consent to being restored to the same status, rights and entitlements (less appropriate offsets against back pay and allowances), or he cannot consent to the restoration but receive back pay, less appropriate offsets, and service credit.

After the AFBCMR denied his application for a SB, several majors with similar circumstance filed a petition with the Court of Federal Claims (CoFC). The CoFC ruled in favor of the Air Force. Then, one plaintiff, appealed the decision to the CoAFC. The CoAFC in *Baude v United States* concluded that the AFBCMR's decision to deny the plaintiff and him the request for a SB for continuation was arbitrary, contrary to law and unsupported by evidence. The CoAFC ordered the plaintiff be considered by a SB. He cites several court cases that the AFBCMR is under a legal obligation to decide similar cases in a similar manner.

To ensure he receives thorough and fitting relief if selected for continuation by the SB, he requests the AFBCMR decide that his promotions to lieutenant colonel and colonel by the Air Force Reserve, effective 1 Oct 13 and 1 Jul 19, respectively; be recognized or that SBs be convened to determine he would have been promoted during the continuation period before he exercises the option provided in 10 U.S.C. § 1558(c) to consent or not consent to continuation. He was promoted to colonel in the Air Force Reserve and is serving on the Reserve active duty list (ADL). Per 10 U.S.C. § 533(f)(1) and DODI 1310.01, *Rank and Seniority of Commissioned Officers*, the DOR of a Reserve officer on the ADL who receives an original appointment as a Regular commissioned officer is the same as that which the officer held immediately before his appointment in the Regular officer. He requests the AFBCMR obtain an advisory opinion on whether his effective of promotion to colonel will be recognized if reinstated to the Regular ADL and for calculation of back pay, whether or not he chooses to be reinstated onto active duty.

The decision to recognize his Reserve promotions to lieutenant colonel and colonel would be consistent with the prior AFBCMR decision in BC-2006-00134, stating the Board only substitutes its judgment and authority for that of a duly constituted promotion board in the most egregious of circumstances where it established that an applicant did not and cannot receive fair and equitable promotion consideration and the applicant has strong support validating their qualification for promotion to the higher grade. His circumstances warrant the AFBCMR

recognizing his Reserve promotions to lieutenant colonel and colonel. It is doubtful he can receive fair and equitable promotion consideration by SSBs without having received the same assignment opportunities as Regular officers. He is also not competitive as he has no active duty officer performance reports (OPRs), no active duty promotion recommendation forms (PRF) and no active duty assignment history for the continuation period.

Recognition of a Reserve promotion upon an officer's return to active duty is not without precedent. In BC-2004-03840, the AFBCMR recognized a Reserve promotion for an officer who would not otherwise receive fair and equitable promotion consideration. Like the applicant in BC-2004-003840, he was competitively selected for promotion by a Reserve central promotion board and it is possible he could have been promoted to lieutenant colonel and colonel by an active duty board at some time later in his career had he been continued. He provides a summary of his accomplishments supporting recognition of his Reserve promotions to lieutenant colonel and colonel.

DODI 1320.08, in effect at the time of his continuation board stated "A commissioned officer on the active duty list (ADL) in the grade of O-4 who is subject to discharge according to section 632 shall normally be selected for continuation if the officer will qualify for retirement according to section 3911, 6323 or 8911, within 6 years of the date of the continuation." The applicant's complete submission is at Exhibit G.

The applicant cites BC-2002-04092 in support of his request. The AFBCMR in this case directed the applicant be considered by a SSB for promotion to lieutenant colonel. The Board concluded that due to special instructions given to the CY94A board, minority and female officers were evaluated more favorably than their records otherwise permitted. The applicant in support of her requested cited the CoAFC decision in Berkley that the MOI to the selection board erroneously required differential treatment of officers based on their race and gender.

The applicant cites BC-2004-03840 in support of his request. The applicant in this cited case was discharged in the grade of captain (O-3) after his twice deferral for promotion to major by an active duty CSB. In Sep 04, the AFBCMR removed an OPR from his record and he was considered for SSB for promotion to major. While he was not selected for promotion, he was offered continuation and on 7 Dec 04, he accepted the initial continuation offer. On 9 Dec 04, after accepting continuation, he requested the Board reinstate him to active duty in the grade of major and he receive SSB for promotion to lieutenant colonel on what would have been his in the promotion zone (IPZ) board. On 24 Mar 05, the Board agreed with AFPC/DPPPO that the applicant was competitively selected for promotion to major by a Reserve CSB, and it was possible with additional reports in his record he could be recommended for promotion by an active duty board at some time later in his career. The Board directed the applicant's record's be corrected as follows: (a) He was not discharged but was continued on active duty; (b) He was selected for promotion to the grade of major; (c) He be promoted to the grade of major with a DOR of 1 Oct 02, upon Senate confirmation and (d) Any non-selections for promotion to the grade of lieutenant colonel prior to receiving a minimum of two officer performance reports (OPRs) with at least 250 days of supervision in the grade of major be set aside.

The applicant cites BC-2006-00134 in support of his request. The applicant in this cited case requested he receive a direct promotion to the grade of lieutenant colonel as if he was selected by the CY2002A Lieutenant Colonel CSB. On 18 May 06, the Board considered and denied his request for direct promotion to lieutenant colonel but granted his request for reinstatement to active duty. On 12 and 13 Mar 07, he wrote letters to the SecAF and the AFBCMR to review if the findings violated his equal protection rights. By virtue of his promotion to major by a SSB and his return to active duty, he became eligible to meet lieutenant colonel CSBs as early as 2002. He missed several promotion boards while he was a member of the United States Navy. He further contended he could not receive fair and equitable promotion consideration by a SSB

and requested the Board reconsider his direct promotion to lieutenant colonel. On 27 Feb 08, the Board recommended the applicant's record be corrected to incorporate personnel records rendered while a member of the Navy into his existing Air Force records, he be considered for promotion to lieutenant colonel by a SSB, with his records including Navy records and any nonselections incurred as a result of the SSBs be set aside. The cited AFBCMR cases are at Exhibit L.

## **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 rewrite 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.

10 U.S.C. § 637(a)(3). An officer who holds the regular grade of major who is subject to discharge or retirement in accordance with section 632 of this title may not be continued on active duty under this subsection for a period which extends beyond the last day of the month in which he completes 24 years of active commissioned service unless he is promoted to the grade of lieutenant colonel.

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.

10 U.S.C. § 533(f), A Reserve officer who receives an original appointment as an officer in the Regular Air Force, (1) In the case of an officer on the ADL immediately before that appointment as a regular officer, be appointed in the same grade and with the same DOR as the grade and DOR held by the officer on the ADL list immediately before the appointment. (2) In the case of an officer not on the ADL immediately before that appointment as a regular officer, be appointed in the same grade and with the same DOR as the grade and DOR which the officer would have held had the officer been serving on the ADL on the date of the appointment as a regular officer.

10. U.S.C. § 1370, Retirement in Highest Grade in Which Served Satisfactorily. Unless entitled to a different retired grade under some other provision of law, a commissioned off of the Air Force who retires under any provision of law other than chapter 61 or 1223 shall be retired in the highest permanent grade.

DODI 1300.04, *Inter-Service and Inter-Component Transfers of Service Members*, paragraph 2.2(c) Secretaries of the Military Departments may approve transfers into their respective departments that are acceptable to both the gaining Military Service and the losing uniformed service and are in the best interests of both parties.

DODI 1300.04, paragraph 3.2(b)(1)(a) A commissioned officer transferring between the active duty list and the Reserve Active Status List (RASL) of the same Military Service will be processed for an original appointment in accordance with DODI 1310.02, *Original Appointment of Officers*. The officer's appointment grade and DOR will be determined by the Military Service concerned.

DODI 1310.02, *Original Appointment of Officers*, Enclosure 3(a) All Regular and Reserve appointments for officers in the grade of lieutenant colonel are made by the President, by and with the advice and consent of the Senate, unless otherwise authorized in law.

AFI 36-2501, *Officer Promotions and Selective Continuation*, paragraph 7.1, SecAF Responsibilities. Determines when to hold a continuation board based on Air Force requirements, establishes continuation quotas, approves termination of continued officers (prior to expiration of term), approves continuation propriety actions and board reports.

AFI 36-2501, *Officer Promotions and Selective Continuation*, paragraph 6.1, Holding SSBs. AFPC conducts promotion SSBs to consider officers who were improperly considered or not considered, by one or more Central Selection Boards. Use SSBs for active duty, separated, or retired officers, if eligible according to paragraph 6.3. Paragraph 6.3.1.1, the action of the board that considered the officer was contrary to law or involved material error of fact or material administrative error. Paragraph 6.3.2, Pursuant to Formal Appeal, the AFBCMR can grant SSBs when they determine an officer's nonselection for promotion resulted because of an error or injustice in the officer's record.

AFI 36-2501, *Officer Promotions and Selective Continuation*, paragraph 7.7.5, Military Personnel Flight (MPF) returns all acceptance/declination statements for selective continuation.

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 Air Force Reserve for the same period.

## **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. As a consequence, of his two nonselections for promotion, he was separated from the Air Force on 30 Nov 11. In 2011, the applicant filed for relief through the AFBCMR. The Air Force position at that time was the 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. Thereafter several of the applicants filed for relief to the CoFC. In Apr 2018, the CoFC ruled confirming the AFBCMR's decision to deny relief. Thereafter, one major petitioned the CoAFC for relief on behalf of himself and the other applicants. In Apr 20, the CoAFC issued its opinion, *Baude v United States*, rejecting the AFBCMR's decision to deny relief. The CoAFC ruled the SecAF did not possess the discretion to alter the continuation requirements and sent the case back to the AFBCMR with instructions to convene a SB for the plaintiff's noncontinuation 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 based on several court opinions indicating agencies must treat like cases alike, unless there is a relevant distinction.

The applicant's case is distinguishable from the plaintiff's since the CoAFC has not directed any action by the AFBCMR on behalf of the applicant, as they did on behalf of the plaintiff. With the plaintiff, the AFBCMR had no choice but to convene a 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 7 Mar 22 for comment (Exhibit J) and the applicant replied on 8 Mar 22. In his response, the applicant contended AFPC/JA advised that the AFBCMR is not bound to consider his case, that his case is distinguishable from the plaintiff in *Baude v United States* but did not articulate any principles in the opinion that do not apply to his application. There are none. The advice ignores court opinions that state like cases should be treated alike. The advisory opinion states the AFBCMR may grant his request for SB utilizing the standard of six years retirement vice five if it believed the principles articulated in *Baude v United States* apply in his case. The Berkley decision

opened the door for officers who did not participate in the lawsuit to request SSBs. The Air Force judge advocate advised that the Air Force was bound by the Berkley decision if the AFBCMR determined there was an error or injustice.

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 Board notes the applicant requests if selected for continuation, his promotion to lieutenant colonel and colonel in the Air Force Reserve be recognized, he be reinstated to active duty in the grade of major until 24 years of service and SSBs be convened if his Reserve promotions are not recognized. However, these requests are dependent on his selection for continuation, and thus, are not ripe for adjudication by the Board at this time. The Board also notes per AFI 36-2501, should the applicant be selected for continuation by the SB, he will be afforded the opportunity to accept or decline continuation in accordance with AFI 36-2501. Moreover, the Board does not find his selection for promotion to lieutenant colonel and colonel in the Air Force Reserve sufficient evidence to sustain he would have been selected for promotion to lieutenant colonel and colonel by an active duty board. The applicant also cites AFBCMR cases in support of granting his requests; however, the Board finds the cited cases are not similar. In this respect, none of the applicants in the cited cases were considered and denied continuation by the CY11A Major Selective Continuation Board with the SecAF MOI that the CoAFC opined violated DODI 1320.08. The Board concludes the recommended correction of the applicant's records is proper, fitting and in accordance with the CoAFC ruling in *Baude v United States* ordering the plaintiff be considered by a SB for continuation in the rank of major. Therefore, the Board recommends correcting the applicant's records as indicated below.

## **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 convening date of the board (7 Mar 11) shall normally be continued. Officers not within six years of retirement may be recommended for continuation, but only if determined that continuation is clearly in the best interest of the Air Force. It will normally be in the best interest of the Air Force to continue officers with critical skills. The SecAF has 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).

## **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-2011-02795-3 in Executive Session on 8 Apr 22:

, Panel Chair  
, Panel Member  
, Panel Member

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

- Exhibit F: Record of Proceedings, w/ Exhibits A-E, dated 26 Apr 12.
- Exhibit G: Application, DD Form 149, w/atchs, dated 20 Aug 21.
- Exhibit H: Documentary evidence, including relevant excerpts from official records.
- Exhibit I: Advisory Opinion, AFPC/JA, dated 4 Mar 22.
- Exhibit J: Notification of Advisory, SAF/MRBC to Applicant, dated 7 Mar 22.
- Exhibit K: Applicant's Response, dated 8 Mar 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.