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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

THIRD ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2013-04272-4

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COUNSEL:

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HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Board reconsider his request for the following:

1. He be restored to active duty, with back pay.
2. He be granted an active duty retirement.
3. He receive any other relief he may be entitled to receive.

RESUME OF THE CASE

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

On 30 Nov 11, he was honorably discharged from the Regular Air Force in the grade of O-4 with a narrative reason for separation of "Non-selection, Permanent Promotion." He was credited with 14 years, 11 months and 8 days of active duty service.

On 30 Oct 14 and 8 Feb 17, the Board denied the applicant's request for reinstatement and continuation. The Board determined it was within the Secretary of the Air Force's (SecAF) authority to narrow the continuation window from within six years to within five years of retirement in accordance with DoDI 1320.08, *Continuation of Commissioned Officers on Active Duty and on the Reserve Active Status List*. The Court of Federal Claims (CoFC) also opined it was within the SecAF's authority to narrow the continuation window for the CY11A Major Selective Continuation Board.

On 9 Apr 20, the Court of Appeals for the Federal Circuit (CoAFC) reversed the CoFC decision and ruled the SecAF lacked the authority to modify DoDI 1320.08 by narrowing the continuation window from within six years to within five years of retirement for the CY11A Major Selective Continuation Board. On 23 Oct 20, the CoAFC ordered the Air Force to consider the plaintiff in *Baude v. United States* for continuation. On 25 Mar 21, the Air Force convened a special board (SB) for the plaintiff. Because the plaintiff in *Baude v. United States* was not an attorney and could only represent himself, the CoAFC ruled only on behalf of the plaintiff.

On 3 Nov 22, the Board considered and partially granted the applicant's request. The Board found the applicant similarly situated to the plaintiff in *Baude v. United States* and granted the request he be considered by an SB for the CY11A Selective Continuation Board. However, the Board denied the applicant's request for reinstatement, retirement and back pay finding the requests were not

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ripe for adjudication by the Board at the time. In this respect, the Board noted the applicant would have to first be selected for continuation and if selected, accept or decline continuation in accordance with DAFI 36-2501, *Officer Promotions and Selective Continuation*. The Board also noted it was without authority to pay expenses of any kind incurred, to include attorney fees, in connection with a request for correction of military records.

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 V.

As directed by SAF/MRB, the applicant was considered by an SB for the CY11A Major Selective Continuation Board, and he was selected for continuation. On 5 Apr 24, the applicant signed the Statement of Acceptance for Initial Selective Continuation of Majors with Less than 18 Years Active Federal Military Service, Board Work-Product. The applicant accepted continuation on active duty until he qualified for retirement as an officer (20 years active military service and 10 years active commissioned service).

On 27 Apr 24, the applicant, through counsel, requested reconsideration of his request for reinstatement on active duty, he be retired from active duty, and he receive any other benefits and entitlements due to him. His discharge was wrongful and due to the SecAF's supplemental instructions to the promotion board, which violated DoDI 1320.08. Counsel also stated any clients who earned a grade higher than O-4 were in no way waiving the rank attained. The applicant's records do not reflect he earned any higher promotion through service in the Air Force Reserve or Air National Guard.

The applicant's complete submission is at Exhibit W.

APPLICABLE AUTHORITY/GUIDANCE

Per 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.

AIR FORCE EVALUATION

AFPC/DPMSSR (Military Retirements) recommends approval. When an officer is selected for continuation by an SB and allowed to serve to retirement, the mandatory separation date is established as the last day of the month in which the officer completed 20 years of active service, provided at least 10 years of that service as a commissioned officer.

Prior to 1 Jan 21, 10 U.S.C. § 1370 paragraph (b)(1) required officers in the grade of O-5 and above to serve on active duty in that grade for a period of not less than three years, and officers in the grade of O-4 and below to serve on active duty for a period of not less than six months, to be retired in that grade. Effective 1 Jan 21, the law changed to require officers in the grade of O-4 and above to serve on active duty in that grade for a period of not less than three years to be retired in that grade. Officers may request to retire prior to completing the required service in grade; however, the Air Force will authorize the retirement in the next lower grade, unless a waiver is approved.

For calculation of service dates for applicants who elected to serve in the Reserve component after separation from active duty and may have attained additional active duty service to qualify and be approved for a Reserve retirement, ARPC must cancel the projected Reserve retirement before AFPC Retirements can approve the active duty length of service retirement.

Should the Board grant the request, the record would be corrected to show the applicant was not separated but continued on active duty to the last day of the month in which the applicant reached minimum retirement eligibility, the applicant's Reserve retirement was not approved and that he was retired in the grade of O-4 the first day of the month in which the officer reached minimum retirement eligibility.

Per 10 U.S.C. § 1174(h), a member who received separation pay under this law who subsequently attains retirement shall have deducted from the retired pay the amount equal to the total amount of separation pay received. There is no Secretarial waiver of recoupment authorized within the law.

The complete advisory opinion is at Exhibit Y.

The Defense Finance and Accounting Service (DFAS) Corrections of Records Potential Affected Pay Actions Upon Reinstatement, Continuation, Retirement Information was provided to the applicant. The fact sheet includes potential offsets from retroactive reinstatement onto active duty and offsets from retroactive retirement. Potential offsets include separation pay, Department of Veterans Affairs (DVA) compensation and benefits, retired pay, retired pay received during Reserve service, civilian earnings and Survivor Benefit Plan (SBP) deductions. Each case is settled on the individual circumstances and the settlements are complex.

The complete advisory opinion is at Exhibit Z.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant and counsel on 24 May 24 for comment (Exhibit AA) but has received no response.

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 concurs with the rationale and recommendations of AFPC/DPMSSR and DFAS and finds a preponderance of the evidence substantiates the applicant's contentions. The applicant was selected for continuation by the SB for the CY11A Major Selective Continuation Board and signed the Statement of Acceptance for Selective Continuation, which is sufficient for the Board to recommend the applicant be reinstated in the grade of O-4 and continued to 20 years of service for retirement effective 1 Jan 17, in the grade of O-4. 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 was not discharged from active duty on 30 Nov 11, but on that date he continued to serve on active duty until 31 Dec16.
- b. He was retired from active duty in the grade of O-4, effective 1 Jan 17.

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-2013-04272-4 in Executive Session on 29 Aug 24:

Work-Product, Panel chair
Work-Product Panel Member
Work-Product Panel Member

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

- Exhibit V: Addendum to Record of Proceedings, w/ Exhibits A-U, dated 9 Mar 23.
- Exhibit W: Application, DD Form 149, w/atchs, dated 27 Apr 24.
- Exhibit X: Documentary evidence, including relevant excerpts from official records.
- Exhibit Y: Advisory Opinion, AFPC/DPMSSR, dated 27 Oct 23.
- Exhibit Z: DFAS Information, undated.
- Exhibit AA: Notification of Advisory, SAF/MRBC to Applicant,, dated 24 May 24.

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.

9/18/2024

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Board Operations Manager, AFBCMR
Signed by: USAF