



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

THIRD ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2013-04282-4

Work-Product

COUNSEL:

Work-Product

HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Board reconsider his request for the following:

1. His discharge from active duty on 30 Nov 11 be rescinded.
2. He be continued on active duty until qualified for retirement as an officer.
3. He be provided all back pay and entitlements.
4. 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, 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 15 years, 5 months and 21 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

AFBCMR Docket Number BC-2013-04282-4

Work-Product

Work-Product

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 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 prior requests and the rationale of the earlier decisions, see the AFBCMR Letter and Records 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 10 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 P0411A. 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 12 Apr 24, counsel, on behalf of the applicant, requested reconsideration of his request for reinstatement on active duty and he be retired from active duty. 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 with the Air Force Reserve or Air National Guard (ANG).

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.

The Equal Access to Justice Act authorizes payment by the government of attorney's fees and costs for successful federal court litigation against the government.

DAFI 36-2603, *Air Force Board for Correction of Military Records*, 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. § 1552. This includes attorney's fees or other costs related to an AFBCMR application.

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 31 May 24 for comment (Exhibit AA). In an email dated 18 Jun 24, the applicant indicated he concurred with a 20 year retirement in the grade of O-4, with all benefits associated for the correction, to include back pay, entitlements, retirement benefits, credits and bonuses. He also requested other damages and that he be reimbursed attorney fees. He was not in the ANG or the Reserve and was unemployed from 2012 to 2015 while attending seminary.

The applicant's complete response is at Exhibit BB.

FINDINGS AND CONCLUSION

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.

DAFI 36-2603, *Air Force Board for Correction of Military Records*, 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. § 1552. This includes attorney's fees or other costs related to an AFBCMR application.

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 in part. The applicant was selected for continuation by the SB for the CY11A Major Selective Continuation Board, signed the Statement of Acceptance for Selective Continuation and requested reinstatement with 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 Jul 16, in the grade of O-4. Therefore, the Board recommends correcting the applicant's records as indicated below. 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, per DAFI 36-2603, this Board is without authority to grant the applicant's request for attorney fees and other damages. 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 30 Jun 16.
- b. He was retired from active duty in the grade of O-4, effective 1 Jul 16.

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 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-2013-04282-4 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: Record of Proceedings, w/ Exhibits A-U, dated 13 Mar 23.
- Exhibit W: Application, DD Form 149, w/atchs, dated undated.
- 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 31 May 24.
- Exhibit BB: Applicant's Response, dated 18 Jun 24.

Work-Product

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

Work-Product

Board Operations Manager, AFBCMR
Signed by: USAF

AFBCMR Docket Number BC-2013-04282-4

Work-Product