



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

SECOND ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2014-01389-3

Work-Product

COUNSEL:

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HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Board reconsider her request her deceased spouse's record be corrected as follows:

1. He be restored to active duty, with back pay.
2. He be granted an active duty retirement.
3. He be provided any other relief he may be entitled to receive.
4. She receive entitlement to his back pay, retirement benefits, credits, bonuses and any other damages.

RESUME OF THE CASE

The applicant is the widow of the deceased 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, 6 months and 2 days of active duty service.

The former service member died on **Work-Product**. The state issued death certificate is filed in his automated records management system (ARMS) record.

On 30 Oct 14, the Board considered and denied the applicant's request the former service member's record be corrected for reinstatement and continuation or that he be granted early retirement under the Temporary Early Retirement Authority (TERA). 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

AFBCMR Docket Number BC-2014-01389-3

Work-Product

Work-Product

(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 decedent was 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 ripe for adjudication by the Board at the time. In this respect, the Board noted he would have to first be selected for continuation.

As directed by SAF/MRB, he was considered by an SB for the CY11A Major Selective Continuation Board, and he was selected for continuation. On 17 Apr 24, the applicant, on behalf of the decedent, signed the Statement of Acceptance for Initial Selective Continuation of Majors with Less than 18 Years Active Federal Military Service, Board **Work-Product**.

On 15 May 24, the applicant, through counsel, requested reconsideration of her request for his reinstatement on active duty, he be retired from active duty, and she 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, *Continuation of Commissioned Officers on Active Duty and on the Reserve Active Status List*. Counsel also stated any clients who earned a grade higher than O-4 were in no way waiving the rank attained. The former service member's records do not reflect he earned any higher promotion through service in the Air Force Reserve or the Air National Guard.

The applicant's complete submission is at Exhibit R.

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 was 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 those 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 former service member was not separated but continued on active duty to the last day of the month in which he reached minimum retirement eligibility, his Reserve retirement was not approved and that he was retired in the grade of O-4 the first day of the month in which he 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 T.

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 U.

AFPC/DPFC (Casualty) recommends the AFBCMR provide their office a directive confirming the former service member's continuation of active duty status until his death on **Work-Product**. The directive should also provide a line of duty (LOD) determination, in accordance with DAFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON) and Incapacitation (INCAP) Pay*. The AFBCMR Directive will be used as substantiating documentation and submitted with the death claims to the paying agencies to explain what occurred with the former service member's status and the almost 12-year lapse between death and claim submission.

In accordance with DAFI 36-2910, an LOD is required in the death of a member in which the member was a Regular Air Force member (paragraph 1.2.1.). An illness, injury, disease or death sustained by a member while in qualified duty status is presumed in the LOD (ILOD). The burden of proof is with the Air Force to overcome the presumption. Given the circumstances in this case, the former service member was not under Air Force jurisdiction at the time of his tragic death. The state issued death certificate reflects the cause of death as head trauma and his death was due to an incident during police training, the presumption should be ILOD. The LOD is required to determine eligibility for two benefits, Survivor Benefit Pay (DFAS) and Dependency Indemnity Compensation (DVA).

The complete advisory opinion is at Exhibit V.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 26 Jun 24 for comment (Exhibit W) 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 former service member is the victim of an error or injustice. The Board concurs with the rationale and recommendations of AFPC/DPMSSR, DFAS and AFPC/DPFC and finds a preponderance of the evidence substantiates the applicant's contentions. The former service member was selected for continuation by the SB for the CY11A Major Selective Continuation Board, which is sufficient for the Board to recommend the former service member's record be corrected to show he was not discharged on 30 Nov 11 but continued to serve in the grade of O-4 until his death on Work-Product. Moreover, the Board finds the former service member's untimely death during the continuation period on Work-Product was ILOD per DAFI 36-2910. Therefore, the Board recommends correcting the former service member's records as indicated below.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to DECEASED 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 in the grade of O-4 until his death on Work-Product.
- b. His death on Work-Product occurred during a qualified duty status and was not due to any misconduct or willful negligence and was ILOD.
- c. The death claims to the paying agencies be submitted on behalf of APPLICANT.

CERTIFICATION

The following quorum of the Board, as defined in DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2014-01389-3 in Executive Session on 26 Sep 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 Q: Addendum to Record of Proceedings, w/ Exhibits A-P, dated 8 Mar 23.
- Exhibit R: Application, DD Form 149, w/atchs, dated 15 May 24.
- Exhibit S: Documentary evidence, including relevant excerpts from official records.
- Exhibit T: Advisory Opinion, AFPC/DPMSSR, dated 27 Oct 23.
- Exhibit U: Advisory Opinion, DFAS, undated.
- Exhibit V: Advisory Opinion, AFPC/DPFC, dated 14 Jun 24.
- Exhibit W: Notification of Advisory, SAF/MRBC to Applicant, dated 26 Jun 24.

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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.

1/6/2025

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Board Operations Manager, AFBCMR

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AFBCMR Docket Number BC-2014-01389-3

Work-Product