

SECOND ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXXXXXXXXXX

DOCKET NUMBER: BC-2014-01548

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Board reconsider her request for the following:

1. She be considered for selective continuation for the CY10C Biomedical Science Corps (BSC) Major Selective Continuation Board.
2. She was not discharged on 31 Aug 11 but continued to serve in the rank of major (O-4) until 24 years of service with constructive service credit (CSC).
3. She be considered by a special selection board (SSB) for promotion to the rank of lieutenant colonel (O-5) during the continuation period.
4. If selected by an SSB for promotion to lieutenant colonel, she be afforded the opportunity to decline to be restored and be voluntarily retired in the rank of lieutenant colonel.

RESUME OF THE CASE

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

The applicant was deferred for promotion to the rank of lieutenant colonel by the CY10C Lieutenant Colonel BSC Central Selection Board (CSB), which convened on 8 Nov 10. It was the applicant's second nonselection. Consequently, she was considered for continuation by the CY10C Major BSC Selective Continuation Board and was selected for continuation.

On 6 Dec 10, as required by DODI 1320.08, *Continuation of Commissioned Officers on Active Duty and on the Reserve Active List*, the Secretary of the Air Force (SecAF) notified the Under Secretary of Defense for Personnel and Readiness USD (P&R) of his intent to not continue larger pools of twice deferred officers in the ranks of captain and major who would otherwise qualify for retirement within six years of the date of continuation.

On 15 Dec 10, the SecAF disapproved the applicant's continuation based on the needs of the Air Force.

On 31 Aug 11, the applicant was honorably discharged with a narrative reason for separation of "Non-Selection, Permanent Promotion." The applicant was credited with 15 years, 4 months, and 22 days of active duty service.

On 3 Sep 15, the Board denied her initial request for retirement under the Temporary Early Retirement Authority (TERA), or she be reinstated on active duty under selective continuation. The Board found it was within the SecAF's authority to disapprove the recommendations of the CY10C BSC Major Selective Continuation Board based on the needs of the Air Force.

On 28 Feb 22 and 25 Mar 22, the Board reconsidered the applicant's request. The applicant contended she was similarly situated to the plaintiff in *Baude v. United States* and that the SecAF violated DODI 1320.08 when he disapproved the results of the CY10C BSC Major Continuation Board to lower officer end strength, although she was within six years of retirement from the continuation date. However, the Board did not find the applicant was similarly situated as the plaintiff. The applicant was not considered by the same continuation board as the plaintiff. The plaintiff in *Baude v. United States* was considered by the CY11A Major Selective Continuation Board. The Court of Appeals for the Federal Circuit (CoAFC) found the Memorandum of Instruction (MOI) to the CY11A Major Selective Continue Board narrowing the window of eligibility for continuation from within six years of retirement to within five years of retirement violated DODI 1320.08. The Board in the applicant's case found it was within the SecAF's authority to disapprove the results of the CY10C BSC Continuation Board.

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 Q.

On 28 Nov 22, the applicant requested reconsideration of her request. The applicant contends the corrections should be made as the SecAF did not comply with DODI 1320.08 when he disapproved her selection for continuation by the CY10C BSC Major Continuation Board based on the needs of the Air Force and involuntarily discharged her on 31 Aug 11.

In *Baude v. United States*, the CoAFC analyzed the procedures prescribed in the version of DODI 1320.08, dated 14 Mar 07. The procedures in that version were in effect at the time the SecAF disapproved her continuation on 15 Dec 10. The procedures have since been removed in the current version of DODI 1320.08, dated 7 Jul 17. It was erroneous for the Board to identify the current version as applicable authority/guidance to determine if the principles in *Baude v. United States* applied to her because the changed procedures in the current version cannot be applied retroactively. The CoAFC issued a precedent decision when it determined the version in effect at the time of her involuntary discharge required that the SecAF continue majors who were within six years of retirement on the continuation date except in unusual circumstances. In *Wilhelmus v. Geren*, with respect to the broad discretion afforded to the AFBMCR, the court explained like a court, normally an agency must adhere to its precedents in adjudicating cases. The questions are whether DODI 1320.08 requires the SecAF to continue officers who were within six years of retirement on the continuation date, whether the SecAF has the authority to involuntarily discharge a major who is within six years of retirement on the continuation date, whether the SecAF had the authority to not continue larger pools of majors based on his 6 Dec 10 memorandum notifying the USD (P&R) of his intent to not continue larger pools of majors to meet Congressionally mandated end strength. The CoAFC decision in *Baude v. United States* found officers within six years from retirement shall normally be continued, force management actions cannot constitute unusual circumstances, the notification requirement to USD P&R does not allow the SecAF to depart from prior rules that apply to each individual officer.

Her case is similar to the plaintiff in *Baude v. United States* because both cases require an interpretation of DODI 1320.08 to determine if the SecAF had the authority to not continue majors within six years of retirement on their continuation date to meet Congressionally mandated end strength. The AFPC/JA advisory did not distinguish her case from *Baude v. United States* for the purpose of determining if the CoAFC interpretation of DODI 1320.08 should be applied in her case. The fact that the SecAF did not modify the protective window in the MOI in her continuation board is not a relevant fact for determining how DODI 1320.08 should be interpreted.

The SecAF documented his disapproval of the continuation of 23 of the 24 officers recommended for continuation by the CY10C BSC Major Selective Continuation Board by stating it was based on the needs of the Air Force to lower its end strength and under the authority of 10 U.S.C. §

637(a)(1) and 637(c). *Baude v. United States* opined the Secretary of Defense (SecDef) issued DODI 1320.08, which governed the operations of selective continuation boards and the SecAF was required to follow the procedures in it and the military is bound to follow its own procedural regulations.

Even though she and the plaintiff in *Baude v. United States* met different continuation boards, the 6 Dec 10 memorandum to USD (P&R) shows the SecAF's intent to not continue larger pools of twice deferred officers who otherwise would have qualified for retirement within six years of the date of continuation.

The AFBCMR erroneously applied a "similarly situated" standard as a reason to deny her relief. She and the applicant were "similarly situated" in all material respects and were both within six years of retirement. By disapproving the selection of her continuation by the CY10C BSC Major Selective Continuation Board, the SecAF treated her in a similar manner as to the way he planned to treat majors who would meet the CY11A Major Selective Continuation Board, unless they were within five years of retirement or had a critical skill. The AFBCMR has an obligation to grant relief to correct the SecAF's error. However, the AFBCMR did not treat her in a similar manner when it denied her request for relief. The AFPC/JA advisory stated if the AFBCMR believed the principles articulated in *Baude v. United States* applied to her case, the Board could grant relief. Her case should be reconsidered applying the CoAFC interpretation of DODI 1320.08.

APPLICABLE AUTHORITY/GUIDANCE

10 U.S.C. § 637(c), Continuation of an officer on active duty pursuant to the action of a selection board is subject to the approval of the Secretary of the Military Department concerned.

10 U.S.C. § 637(a)(1) An officer subject to discharge or retirement in accordance with section 632 may subject to the needs of the service, be continued on active duty if selected for continuation. Continuation of an officer on active duty is subject to the Secretary of the Military Department concerned.

Baude v. United States:

On 9 Apr 20, the CoAFC issued an opinion (*Baude v. United States*) that the named appellant demonstrated the AFBCMR's decision in denying him special board (SB) for continuation in the rank of major was arbitrary, contrary to law and unsupported by substantial evidence. The appellant 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 appellant'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 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 an 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 an 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 appellant was considered by an SB convened at AFPC for the CY11A Major Selective Continuation Board.

DODI 1320.08, dated 14 Mar 07, paragraph 6.3, Continuation of Officers Serving in the Grade of O-4. The Secretary of the Military Department concerned may, when the needs of the respective Military Service require, convene continuation selection boards according to section 611 (b) of Reference (d) to recommend commissioned officers in the grade of O-4 on the active duty list who are subject to discharge or retirement according to section 632 of Reference (d) for continuation on the active duty list according to section 637 of Reference (d). A commissioned officer on the active duty list in the grade of O-4 who is subject to discharge according to section 632 of Reference (d) shall normally be selected for continuation if the officer will qualify for retirement according to section 3911, 6323, or 8911 of Reference (d) within 6 years of the date of continuation. The Secretary of the Military Department concerned may, in unusual circumstances such as when an officer's official personnel record contains derogatory information, discharge an officer involuntarily in accordance with section 632 of Reference (d). When the Secretary of the Military Department concerned intends not to continue larger pools of officers in the grade of O-4 who would qualify for retirement within 6 years of the date of a continuation, the Secretary shall notify the USD(P&R) of the proposed course of action. Commissioned officers on the Reserve Active Status List may be considered for continuation subject to the needs of the Military Service and section 14701 of Reference (d).

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 remains unconvinced the evidence presented demonstrates an error or injustice. The applicant contends she is similarly situated to the plaintiff in *Baude v. United States*; however, the Board disagrees. The CoAFC in *Baude v. United States* found the SecAF's guidance in the MOI to the CY11A Major Selective Continuation Board narrowing the selective continuation window from within six years of retirement to within five years of retirement violated DODI 1320.08. However, the applicant was not considered for continuation by the CY11A Major Selective Continuation Board. While the applicant contends the SecAF also violated DODI 1320.08 when he disapproved the recommendations of the CY10C BSC Major Continuation Board that she be continued, the applicant has provided no evidence to sustain this to be the case. The Board notes 10 U.S.C. § 637(c) states the continuation of an officer on active duty pursuant to the action of a selection board is subject to the approval of the Secretary of the Military Department concerned. Further, there has been no court ruling or otherwise to find it was not within the SecAF's authority to disapprove the recommendations of the CY10C BSC Major Selective Continuation Board. The applicant also cites the 6 Dec 10 SecAF notification memorandum to USD P&R of his intent to not selectively continue larger pools of twice deferred officers violated DODI 1320.08. However, there is no evidence the notification memorandum to the USD P&R was illegal. To the contrary, the notification memorandum was a procedural requirement per DODI 1320.08. Therefore, the Board recommends against correcting the applicant's records.

RECOMMENDATION

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

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-2014-01548-3 in Executive Session on 20 Apr 23:

, Panel Chair
, Panel Member
, Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit Q: Record of Proceedings, w/ Exhibits A-P, dated 21 Apr 22.
Exhibit R: Application, DD Form 149, w/atchs, dated 28 Nov 22.
Exhibit S: Documentary evidence, including relevant excerpts from official records.

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.