

## **ADDENDUM TO RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2017-00002-2

XXXXXXXXXXXXXXXXXX

**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. If selected for continuation, his status on active duty be restored with continuation to 24 years with back pay and allowances, less appropriate offsets, and service credit.
2. If selected for continuation, he receive special selection board (SSB) consideration for promotion to the rank of lieutenant colonel (O-5).
3. If selected for promotion to lieutenant colonel, he be advised as to the earliest date he can retire before consenting to restoration on active duty.

### **RESUME OF THE CASE**

The applicant is a retired Air Force Reserve major (O-4), awaiting retired pay upon age 60.

On 30 Nov 11, the applicant was honorably discharged from the Regular Air Force in the rank of major with a narrative reason for separation of "Non-selection, Permanent Promotion." He was credited with 9 years, 1 month and 10 days of active duty service for the period and 5 years, 4 months and 4 days of prior active duty service (total of 14 years, 5 months and 14 days active duty service).

Per ARPC IMT 92, *Appointment Order*, dated 16 Aug 12, the applicant was appointed in the rank of major in the Air Force Reserve on 1 Dec 11.

On 19 May 17, the Board considered and denied his request for SB consideration for continuation. The applicant repeated the arguments of his co-plaintiffs challenging the same CY11A Major Selective Continuation Board. As stated in the previous decisions, the Board noted the Air Force was required to make a reduction in the officer force. The Board found the Secretary of the Air Force (SecAF) acted within the limits of his authority in the instructions provided to the continuation board narrowing the continuation criteria from 6 years to 5 years. The Board also found the applicant's request untimely. 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.

On 13 Oct 17, the applicant was discharged from the Air Force Reserve and placed on the Retired Reserve List in the grade of major.

On 14 May 21, the applicant requested reconsideration of his request based on new evidence issued by the Court of Appeals for the Federal Circuit (CoAFC) in *Baude v. United States*, 9 Apr 20, which established the SecAF violated DODI 1320.08, *Continuation of Commissioned Officers on Active Duty and on the Reserve Active Status List*, when he failed to follow procedures in that regulation for continuing officers who met the CY11A Major Selective Continuation Board.

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.

### **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.

The CY21A Selective Continuation SB convened on 25 Mar 21. The Memorandum of Instruction (MOI) states "This special board will consider officers for selective continuation in place of the CY11A Major LAF Selective Continuation Board and will in addition to using the specific highlighted MOI used by the original board, the following guidance will apply: Majors

who will qualify for retirement within six years of the date of continuation (1 Dec 11) shall normally be continued.”

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. § 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.

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 ANG for the same period.

## **AIR FORCE EVALUATION**

AFPC/JA states the AFBCMR has a choice. If the AFBCMR feels the principles articulated in *Baude v. United States* apply to the applicant’s case, the Board may grant and direct he meet another selective continuation board utilizing the standard of 6 years from retirement vice 5. If, on the other hand, the AFBCMR does not feel the principles articulated in *Baude v. United States* apply, the Board may deny his request for relief.

In 2013 and 2014, most of the 157 majors not selected for continuation by the CY11A Major LAF Selective Continuation Board filed for relief through the AFBCMR. The applicant did not do so until 2016. The Air Force position at the time was that the SecAF’s decision to modify the selective continuation window from within 6 years of retirement to 5 years was within law, DOD and Air Force boundaries. The AFBCMR agreed and denied relief to all applicants. Thereafter, several of the applicants filed for relief to the CoFC. In Apr 18, the CoFC issued its opinion, confirming the AFBCMR’s decisions to deny relief. The CoFC ruled the SecAF possessed the discretion to alter the continuation requirements and did so lawfully. Thereafter, one applicant appealed to the CoAFC. In Apr 20, the CoAFC issued the opinion, *Baude v. United States*, rejecting the decision to alter the continuation requirements and thus, the CoAFC sent the case back to the AFBCMR, with instructions to convene a SB for reconsideration of the plaintiff’s non-continuation utilizing the 6 years from retirement vice 5 years.

The applicant’s case is distinguishable from the plaintiff’s case in *Baude v. United States*. The CoAFC specifically limited its opinion to the named plaintiff because the plaintiff as a non-attorney 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 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 21 Jan 22 for comment (Exhibit J), and the applicant replied on 7 Feb 22. In his response, the applicant states AFPC/JA advises the Board is not bound to consider any applicant other than the plaintiff in *Baude v. United States*; however, this advisory ignores 10 U.S.C. § 1552 providing for reconsideration of Board decisions and is inconsistent with legal advice provided after the decision in *Berkley v United States*. AFPC/JA also states that his case is distinguished from the *Baude v United States* since the CoAFC did not direct any action on his behalf. This advice is also inconsistent with Air Force legal advice in response to the applications citing *Berkley*. AFPC/JA also identified no principles in the CoAFC opinion that does not apply to his application for reconsideration. The CoAFC opinion also indirectly speaks to the AFBCMR's mandate to correct the error for officers who faced the same process the plaintiff in *Baude v. United States* faced. He, like the plaintiff, was considered for continuation by the CY11A Major Selective Continuation Board, which received a Memorandum of Instruction (MOI) from the SecAF that violated DODI 1320.08, as determined by the CoAFC.

The applicant's complete response is at Exhibit K.

In an additional response dated 15 Sep 22, the applicant stated he was recently made aware of an AFBCMR decision in a similar case. He and the plaintiff in *Baude v United States* are identically situated, to include involuntary separation on 30 Nov 11 and same Air Force Specialty Code (AFSC). He requests equal consideration and treatment using the decision handed down by the CoAFC. He requests the AFBCMR provide equal and fair consideration by providing the Selective Continuation Board an MOI in accordance with the SecAF's guidance that directs 1 Dec 11 as the date of continuation and for calculating six years from retirement in accordance with DODI 1320.08. This would also be consistent with the CoAFC decision to convene a SB for reconsideration of non-continuation through a process consistent with the plain language in DODI 1320.08.

The applicant's complete response is at Exhibit L.

## **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 6 years of retirement to within 5 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 he be continued to 24 years of service, instead of 20; and he be granted SSB consideration for promotion to lieutenant colonel; however, the requests are dependent on the results of the SB for continuation. Accordingly, the Board finds these requests are not ripe for adjudication by the Board at this time. Moreover, the Board concludes the recommended corrections of the applicant's records are proper, fitting and in accordance with the CoAFC ruling in *Baude v United States* ordering the plaintiff be considered for 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 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-2017-00002-2 in Executive Session on 28 Feb 22 and 29 Nov 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 31 Jul 17.
- Exhibit G: Application, DD Form 149, w/atchs, dated 14 May 21.
- Exhibit H: Documentary evidence, including relevant excerpts from official records.
- Exhibit I: Advisory Opinion, AFPC/JA, dated 21 Jan 22.
- Exhibit J: Notification of Advisory, SAF/MRBC to Applicant, dated 21 Jan 22.
- Exhibit K: Applicant's Response, w/atchs, dated 7 Feb 22.
- Exhibit L. Applicant's Response, w/atchs, dated 15 Sep 22.

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.