



CUI//SP-MIL/SP-PRVCY

**UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS**

SECOND ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2017-00002-3

Work-Product

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Board reconsider his request for the following:

1. His records be corrected to show he was not discharged on 30 Nov 11 but continued on active duty until reaching eligibility for a 20 year active duty service retirement in the grade of major (O-4).
2. His Reserve retirement effective 13 Oct 17 be updated to reflect his active duty retirement.
3. He be provided a new DD Form 214, *Certificate of Release or Discharge from Active Duty*, to reflect his new date of discharge.
4. He be provided all back pay in accordance with the correction of his records, less any appropriate offsets against back pay and allowances.
5. Any inactive duty training (IDT) points from his 10 years in the Air National Guard (ANG) be included in the final calculation for his active duty retirement.

RESUME OF THE CASE

The applicant is a former Air Force major (O-4) and retired Air Force Reserve major, eligible for retired pay except for attainment of eligibility age.

The applicant served a period of active duty in the Regular Air Force from 21 Oct 02 to 30 Nov 11. He was honorably discharged in the grade of O-4, with a narrative reason for separation of "Nonselection, Permanent Promotion." He was credited with 9 years, 1 month and 10 days active duty service for the period. The applicant was also credited with 5 years, 4 months and 4 days of prior active duty service.

Per Reserve Order **Work-Product** dated 18 Jun 18, the applicant was assigned to the Retired Reserve in the grade of O-4, effective 13 Oct 17.

On 28 Feb 22 and 29 Nov 22, the Board considered and partially granted his request. The Board granted the applicant's request he be considered by a special board (SB) for the CY11A Major Selective Continuation Board in accordance with the decision of the Court of Appeals for the Federal Circuit (CoAFC). The CoAFC determined in *Baude v United States* that the Secretary of the Air Force (SECAF) violated DoDI 1320.08, *Continuation of Commissioned Officers on Active Duty and on the Reserve Action Status List*, when he issued the CY11A Major Selective

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Continuation Board a Memorandum of Instruction (MOI) narrowing the selective continuation window from within six years of retirement to within five years of retirement. In accordance with the CoAFC opinion, the Board granted the applicant's request he be considered by a SB for continuation by the CY11A Major Selective Continuation Board. However, the Board denied the applicant's request he be continued to 24 years and that he be considered by a special selection board (SSB) for promotion to the grade of lieutenant colonel (O-5).

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 M.

As directed by the AFBCMR, the applicant was considered by a SB for the CY11A Major Selective Continuation Board and selected for continuation. On 7 Nov 23, 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 qualified for retirement as an officer (20 years active military service and 10 years active commissioned service) or age 62, whichever date is earlier.

On 13 Nov 23, the applicant requested reconsideration of his request he be continued on active duty in the grade of O-4 until retired from active duty with a 20 year service retirement in accordance with his selection by the P0411A SB convened on 5 Jun 23. In support of his request, the applicant provides his Statement of Acceptance for Initial Selective Continuation of Majors with Less than 18 Years Active Federal Military Service Board P0411A signed on 7 Nov 23. He accepted continuation on active duty until qualified for retirement as an officer (20 years active military service and 10 years commissioned service) or age 62, whichever date is earlier. The applicant also requested his Reserve retirement be converted to an active duty retirement and he receive all back pay and benefits, less any offsets. The applicant also requested his IDT points in the ANG be calculated in his retirement date and he be provided an updated DD Form 214.

The applicant's complete submission is at Exhibit N.

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 recommends approval for the request for an active duty retirement in current grade. When an officer is selected for continuation by a 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 a commissioned officer.

As outlined in AFI 36-3203, *Service Retirements*, paragraph 1.1.3, Retirement Effective Date, the Air Force can approve a non-disability active duty retirement effective no earlier than the first day of the month after the month in which the officer attains basic eligibility.

The mandatory date of separation is established in accordance with 10 U.S.C. § 632, Effect of Failure of Selection for Promotion: Captains and majors of the Army, Air Force and Marine Corps and lieutenants and lieutenant commanders of the Navy. When an officer is selected for continuation by a 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.

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When determining an officer's retired grade, provisions in 10 U.S.C. § 1370, Regular Commissioned Officers, are used. Prior to 1 Jan 21, 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 retire 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.

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.

AFPC/DPMSSR provides an advisory opinion for the request to change a Reserve retirement to an active duty retirement in current grade. Officers who elected to serve in the Reserve component after being separated from active duty may have attained additional active duty service to qualify and be approved for a Reserve retirement. In these cases, ARPC must cancel the projected Reserve retirement before the AFPC retirements branch can approve the active duty length of service retirement.

The complete advisory opinions are at Exhibit P.

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, the Department of Veterans Affairs (DVA) compensation and benefits, retired pay, retired pay received during Reserve service, civilian earnings and survivor benefit program (SBP) deductions. Additionally, each case is settled on the individual circumstances and that the settlements are complex.

The complete advisory opinion is at Exhibit Q.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 13 Nov 23 for comment (Exhibit R). In an email dated 14 Nov 23, the applicant indicated he had no questions and did not intend to submit any comments in response to the advisory opinions.

The applicant's complete response is at Exhibit S.

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 in part. Specifically, the applicant has provided evidence to show he was selected for continuation by a SB for the CY11A Major Selective Continuation Board and on 7 Nov 23, he signed the Statement of Acceptance for Selective Continuation in the grade of O-4 until qualified for a 20 year active

duty service retirement in the grade of O-4. The Board finds the applicant's acceptance for continuation and his request for an active duty retirement in the grade of O-4 sufficient to justify granting the applicant's request for cancellation of his Reserve retirement in the grade of O-4, effective 13 Oct 17 and grant the applicant continuation on active duty with a 20 year active duty retirement in the grade of O-4, effective 1 Jul 17. 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 applicant requests his IDT points from his 10 years in the ANG be included in his final calculation for his active duty retirement. However, the applicant's participation in the ANG and IDT points are not creditable towards active duty service. 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. His Reserve retirement in the grade of O-4, effective 13 Oct 17 be canceled in the military personnel data system (MilPDS).
- b. 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 17.
- c. He was retired from active duty in the grade of O-4, effective 1 Jul 17.

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-2017-00002-3 in Executive Session on 14 Dec 23:

Work-Product [REDACTED], Panel Chair
Work-Product [REDACTED], Panel Member
Work-Product [REDACTED], Panel Member

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

- Exhibit M: Addendum to Record of Proceedings, w/ Exhibits A-L, dated 2 Dec 22.
- Exhibit N: Application, DD Form 149, w/atchs, dated 13 Nov 23.
- Exhibit O: Documentary evidence, including relevant excerpts from official records.
- Exhibit P: Advisory Opinions, AFPC/DPMSSR, dated 27 Oct 23.
- Exhibit Q: Notification of Advisory, SAF/MRBC to Applicant,, dated 13 Nov 23
- Exhibit R: Applicant's Response, w/atchs, dated 14 Nov 23.

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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.

2/15/2024

Work-Product

Board Operations Manager, AFBCMR
Signed by: USAF