

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXXXXXXXXXX

DOCKET NUMBER: BC-2021-02470-2

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Board reconsider his request for the following:

1. He receive a direct active duty promotion to the rank of lieutenant colonel (O-5) based on his promotion to lieutenant colonel in the Air Force Reserve, effective 10 Aug 12.
2. In the alternative, he be considered for promotion to the rank of lieutenant colonel by a Regular Air Force special selection board (SSB) for the CY12A, CY13A, CY14A, CY15A and CY16A Lieutenant Colonel Central Selection Boards (CSBs).
3. There be no determination he be paid as a major (O-4) instead of a lieutenant colonel from 2 Jul 16 through 30 Nov 21 for backpay purposes.
4. His retirement pay as of 1 Jul 16 be recomputed for his periods of active duty service from 2 Jul 16 until his retirement on 1 Dec 21, using his high three earnings as a lieutenant colonel.

RESUME OF THE CASE

The applicant is a former Regular Air Force major (O-4) and retired lieutenant colonel (O-5).

On 30 Nov 11, the applicant was honorably discharged in the rank of major with a narrative reason of "Non-Selection, Permanent Promotion." He was credited with 15 years, 5 months and 18 days of active duty service.

Following his discharge from active duty, the applicant performed periods of active and inactive duty with the Air Force Reserve and was promoted to lieutenant colonel on 10 Aug 12.

The Court of Appeals for the Federal Circuit (CoAFC) determined the Secretary of the Air Force (SecAF) violated DODI 1320.08, *Continuation of Commissioned Officers on Active Duty and on the Reserve Active List*, when it narrowed the continuation window from within six years of retirement to within five years of retirement for the CY11A Major Selective Continuation Board. As ordered by the CoAFC, on 25 Mar 21, the applicant (plaintiff in the case) was considered by a special board (SB) for continuation for the CY11A Major Selective Continuation Board. On 27 Apr 21, AFPC informed the applicant he was selected for continuation and requested he sign the selective continuation contract accepting or declining continuation by 27 May 21. The applicant did not sign the selective continuation contract but instead submitted an exigence request to the AFBCMR.

On 27 Oct 21, the Board considered the applicant's requests for the following:

1. He be reinstated on active duty in the grade of lieutenant colonel (O-5), per his promotion in the Air Force Reserve on 10 Aug 12.
2. He be allowed to defer signing the 20 year selective continuation contract.
3. He be permitted to sign a 24 year selective continuation contract.
4. He be retired from active duty on 1 Oct 21, or the date established for return to duty with immediate retirement.
5. He receive back pay and constructive service credit (CSC) to 30 Jun 20, the date he would be required to retire as a major (O-4).
6. He receive back pay from 1 Dec 11 to the date he is restored to active duty should his records be corrected to show he was promoted to lieutenant colonel during the continuation period.
7. He receive back pay from 1 Dec 11 to 30 Jun 20 should his records not be corrected to show he was promoted to lieutenant colonel and should he decline continuation. In this instance, the Air Force Reserve be notified he is entitled to active duty CSC from 1 Dec 11 to 30 Jun 20.
8. In the alternative, he be considered by an SSB for promotion to lieutenant colonel for 2012 to 2015, without having to sign his selective continuation contract. If selected and approved for promotion to lieutenant colonel, he be continued to a specified date until retirement as requested.

The Board partially granted the applicant's request and recommended his records be corrected to show he was not discharged from active duty on 30 Nov 11 but continued to serve on active duty until 30 Jun 16, when honorably discharged for retirement in the rank of major, effective 1 Jul 16. The Board also recommended the applicant's transfer to the Air Force Reserve be corrected to show he was approved for an inter-service transfer on 2 Jul 16. The Board did not find it compulsory to recommend he be considered by an SSB; nor did the Board find his selection for promotion to lieutenant colonel by an Air Force Reserve CSB as evidence he would have been selected for promotion to lieutenant colonel by an active duty CSB. The Board also did not find the cited AFBCMR cases similar to the applicant's case. The Board noted his Air Force Reserve promotion and retirement in the rank of lieutenant colonel.

Per Special Order dated 25 Oct 21, the applicant was transferred to the Retired Reserve and his name was placed on the Air Force Retired List for retirement in the rank of lieutenant colonel effective 1 Dec 21.

On 6 Feb 22, the Director of the Air Force Review Boards Agency (AFRBA) signed the directive and a case management system (CMS) action was updated on 15 Feb 22 to request DFAS correct the applicant's record per the AFBCMR Directive. On 15 Feb 22, DFAS noted the case was added to their inventory for correction. The applicant's records do not include an updated DD Form 214, *Certificate of Release or Discharge from Active Duty*, showing he was continued to 30 Jun 16 and retired from the Regular Air Force in the rank of major on 1 Jul 16; nor is there any indication to show the applicant accepted continuation in the rank of major.

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 E.

On 4 Apr 22, the applicant requested reconsideration of his request. If the Board does not grant his request for an active duty promotion to lieutenant colonel, effective 10 Aug 12, he requests the

AFBCMR confirm there will be no change to his final Reserve retired rank of lieutenant colonel. Further, he requests confirmation regarding his pay from 2 Jul 16 through 30 Nov 21 and that his retirement pay calculated as of 1 Jul 16 will be recomputed for his periods of active duty from 2 Jul 16 until his retirement on 1 Dec 21. His retired pay should be based on high three earnings as a lieutenant colonel.

He was not given a full and fair opportunity to present his case. The AFBCMR did not ask him to comment on the rationale that formed the basis for its decision before the final decision was issued. Accordingly, the results are an incomplete administrative record. His case is still under the jurisdiction of the CoAFC. In his Notice of Objections to the Remand Decision filed, he objected to the final decision. One of the reasons is that the AFBCMR recommended he retain his Reserve promotion and date of rank in the findings and conclusion, but it was not carried into the final recommendations, making the AFBCMR's intent unclear and creating potential for corrections that could be detrimental to him. The AFBCMR did not obtain his consent to continuation in accordance with 10 U.S.C. § 1558(c)(2)(A). If the AFBCMR can confirm the changes to his military record will not be detrimental, there would be no need to pursue further judicial review of the noncompliance.

The AFBCMR's decision to not convene SSBs does not comply with 10 U.S.C. § 628(a)(1). Further, the SSB process will not provide fair and equitable results. The AFBCMR departed from precedent in his case by not recognizing his selection for promotion by a Reserve CSB and grant him an active duty lieutenant colonel promotion. Based on court decisions, the AFBCMR should treat similar cases in a similar manner. He used BC-2004-03480 as precedent to grant his request. The applicant in BC-2004-03840 was a captain who was involuntarily discharged after not being promoted. In this case, the Board granted the applicant an active duty promotion to major based on his selection for promotion by a Reserve CSB based on the advisory opinion's recommendation that since he was competitively selected by a Reserve CSB, it was possible with additional reports he could have been promoted by an active duty major's CSB.

He also stated he would decline continuation if his military records were not corrected to show he was promoted to lieutenant colonel during the continuation board. On 1 Dec 21, he voluntarily retired from the Air Force Reserve with sufficient years of active to receive an immediate retirement in the rank of lieutenant colonel.

On 13 Mar 22, he filed a Notice of Objections to the Remand Decision with the CoAFC. It is possible he would have been promoted to lieutenant colonel on active duty; in which case he could have been retained on active duty past the date he would have been required to retire as a continued major and would have had the opportunity to be promoted to higher grades. It is clear he would have been eligible to meet promotion boards if he had been continued. However, he did not meet the boards due to the SecAF's error. When a correction Board fails to correct an injustice clearly presented in the record, it is acting in violation.

The AFBCMR directed correction voids his Reserve service because he cannot be on the active duty list and the Reserve active status for the same period of time. The Board did not ask him to accept or decline consent to continuation but administratively consented for him. Without obtaining his consent, the AFBCMR had no statutory authority to direct his records be corrected as they were. Accordingly, he requests the Board confirm with an update or addendum that there will be no change to his final retired rank of lieutenant colonel from 2 Jul 16 through 30 Nov 21 for back pay and his retirement pay will be calculated as of 1 Jul 16 for his periods of active duty service from 1 Jul 16 until his retirement on 1 Dec 21, using high three earnings as a lieutenant colonel.

The applicant's complete submission is at Exhibit F.

APPLICABLE AUTHORITY/GUIDANCE

Baude v. United States directed the Air Force convene an SB for the applicant (plaintiff in the case) for the CY11A Major Selective Continuation Board finding the SecAF violated DODI 1320.08 in narrowing the continuation window from within five years of retirement vice six years of retirement. The CoAFC did not direct any other actions pertaining to the applicant.

10 U.S.C. § 628(a)(1), *Persons not considered by promotion boards due to administrative error.*

(1) If the Secretary of the Military Department concerned determines that because of an administrative error a person who should have been considered for selection for promotion in or above the promotion zone by a promotion board was not so considered, the Secretary shall convene an SSB under this subsection to determine whether that person (whether or not then on active duty) should be recommended for promotion.

(2) An SSB convened under paragraph 1 shall consider the record of the person whose name was referred to it for consideration as that record would have appeared to the board that should have considered him. That record shall be compared with a sampling of the records of those officers of the same competitive category who were recommended for promotion and those officers who were not recommended for promotion, by the board that should have considered him.

AFI 36-2501, *Officer Promotions and Selective Continuation*, paragraph 7.7.5, Military Personnel Flight (MPF) returns all acceptance/declination statements for selective continuation. Involuntary separation actions will be initiated by AFPC for officers who fail to sign the statement within 60 days from public release.

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 Air Force Reserve for the same period. The applicant's records show he performed periods of active duty while in the Air Force Reserve. Upon any correction of records, the Department of Finance and Accounting Service (DFAS) will be required to complete a review to ensure the applicant does not receive dual federal compensation for the same period of time.

10 U.S.C. § 1558(a), *Correction of Military Records.* The Secretary of a Military Department may correct a person's military records in accordance with a recommendation made by a special board. Any such correction may be made effective as of the effective date of the action taken on a report of a previous selection board that resulted in the action corrected in the person's military records.

10 U.S.C. § 1558(c)(2)(A), A person referred to in 10 U.S.C. § 1558(c)(1) Relief Associated with Correction of Certain Actions, shall with that person's consent be restored to the same status, rights and entitlements (less appropriate offsets against back pay and allowances) in that person's armed forces as the person would have had if the person had not been selected to be involuntarily board separated as a result of an action the record of which is corrected.

DAFI 36-2603, *Air Force Board for Correction of Military Record*, paragraph 7.1.2., Directives will be staffed to responsible agencies for promulgating the corrective action and corrected documents should be added to the applicant's military personnel records. In accordance with procedures, the AFBCMR can direct the revocation or correction of an AFBCMR directive. While the Board partially granted the applicant's request and directed the applicant's records be corrected to show he was continued on active duty in the grade of major until 30 Jun 16, with active duty retirement on 1 Jul 16, the Board may recommend the directive be rescinded.

DAFI 36-2603, paragraph 2.4., *Deciding Cases.* The Board normally decides cases on the written evidence in the record.

The applicant cites BC-2004-03840 and BC-2006-00134 as precedent to grant his requests.

BC-2004-03840: On 24 Mar 05, the Board recommended the applicant's records be corrected to show he was not discharged from active duty on 28 Feb 98 but continued on active duty; he was selected for promotion by the CY02A Major CSB and that the action be initiated to obtain Senate confirmation; upon Senate confirmation, he be promoted to major with a date of rank of 1 Oct 02; and any non-selections for promotion to the grade of lieutenant colonel prior to receiving a minimum of two OPRs with at least 250 days of supervision in the rank of major be set aside. The requests pertained to an earlier case. On 23 Feb 04, the Board minority recommended the applicant's request that his OPR for the period of 9 Jul 93 through 22 Aug 94 be removed, the PRF for the CY96A Major CSB be removed from his record, he be reinstated on active duty, and he be given SSB consideration. The Air Force Review Boards Agency Director agreed with the Board Minority and directed the contested OPR and PRF be removed, and he be given SSB consideration. On 13 Sep 04, the applicant was not selected for promotion by the SSB but selected for an initial three-year continuation period. On 7 Dec 04, he accepted continuation. The applicant in this case did not have any OPR or PRF removed from his records, he did not sign an agreement for continuation and was not previously considered for promotion by an active duty SSB for promotion to lieutenant colonel.

BC-2006-00134: On 27 Feb 08, the Board recommended any records rendered on behalf of his time in the Navy be incorporated into his Air Force records, he be considered for promotion by an SSB, and any non-selections incurred as a result of the SSBs be set aside. The applicant requested a direct promotion to lieutenant colonel, which the Board denied. In this case, the applicant contended his equal protection rights were violated.

AIR FORCE EVALUATION

AFPC/DP2SP recommends denial. The applicant's record is incomplete in comparison to the benchmark records. If the Board's decision is to grant relief, the Board will determine how the applicant's officer performance reports (OPRs), promotion recommendation forms (PRF) and recognition (decorations) will be presented to the five boards (CY12A, CY13A, CY14A, CY15A and CY16A Lieutenant Colonel CSBs). The last active duty OPR closed out 10 Sep 21, the officer will require five PRFs from an assigned senior rater and the officer has no decorations during the five year period.

The complete advisory opinion is at Exhibit H.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 14 Nov 22 for comment (Exhibit I), and the applicant replied on 11 Dec 22. In his response, the applicant contends an SB convened, and he was selected for continuation. SSBs are required to be convened if a person is not considered by a promotion board but the person was eligible to meet due to an administrative error (whether or not they were on active duty). He asserted there would be a material flaw in the SSB process because there were no active duty OPRs or PRFs to provide a fair comparison of his records to benchmarked records. Therefore, he requested the AFBCMR recommend he be granted

an active duty promotion to lieutenant colonel based on his promotion selection by an Air Force Reserve CSB, effective 10 Aug 12; instead of convening SSBs.

The AFPC/DP2SP advisory acknowledged the absence of OPRs, PRFs and decorations required to ensure a fair SSB process and supports the recommendation he be granted an active duty promotion to lieutenant colonel. The advisory did not identify 10 U.S.C. § 628(a) as the governing

statute and not recommending an SSB is a violation of this statute. The recommendation to deny his request also does not treat similarly cases in a similar manner.

In his initial case, he requested the AFBCMR grant him an active duty promotion to lieutenant colonel. He also identified BC-2004-03840 as precedent for recognizing a competitive Reserve promotion. Restoration to the rank of major would require that he be mandatorily retired. The case for recognizing his promotion is stronger than the applicant in BC-2004-0384. He served more than nine years as a lieutenant colonel with the Reserves, with four years of that time on active duty orders, before he retired with more than 20 years of active duty service on 1 Dec 21.

If the AFBCMR concludes he has provided insufficient evidence to support his request for an active duty lieutenant colonel promotion, the AFBCMR has the burden of establishing that it was unlikely he would have been promoted to that grade. He cites *Christensen v. United States*, 23 Mar 04, that the court concluded the ultimate burden should be on the party whose error and obfuscation of the evidence caused the problem in the first place.

His case is still under the jurisdiction of the CoAFC. The AFBCMR did not provide any advisory opinions for comment in his initial case, and he was not given an opportunity to comment on the rationale of the AFBCMR's decision. He advised the judge the decision did not afford a satisfactory basis for disposition of his case, in part because he was not afforded the opportunity to comment. If he had been afforded the opportunity to comment, he could have expressed his concerns about the legality of the AFBCMR's decision and the detrimental impact before the final decision was issued. Rather than starting a judicial review of the AFBCMR's decision, he chose to request a request for reconsideration. The request for reconsideration will be part of the administrative record and subject to judicial review, if necessary to render a final decision in his court case, which is currently under a stay of proceedings pending the AFBCMR's decision.

If the AFBCMR concludes it does not require to convene SSBs and makes a negative determination on issues raised or determines a remedy other than the one he requests, he requests he be provided with the rationale for that determination and an opportunity to comment before the AFBCMR issues a final decision. This will ensure he can provide any concerns with the rationale of the AFBCMR's decision and he can provide his concerns and a completed administrative record for an effective judicial review of the decision.

The applicant's complete response is at Exhibit J.

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 Board concurs with the rationale and recommendation of AFPC/DP2SP and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board notes the applicant did not sign the selective continuation contract to accept continuation as requested by the Air Force Personnel Center but instead made an exigence application to the AFBCMR. On 27 Oct 21, the Board considered the applicant's request. The Board granted the applicant selective continuation with retirement in the rank of major with 20 years of active duty service effective 1 Jul 16 but denied his remaining requests per the rationale in the Record of Proceedings dated 1 Feb 22. The Board understood the continuation period overlapped with time the applicant performed service in the Air Force Reserve and that the Defense Finance and Accounting Service would compute the applicant's entitlement to pay and allowances since by law compensation from more than one federal position for the same period is prohibited. The Board had no intent to harm the applicant and understood he would be provided any back pay and allowances owed him as a result of his continuation, retirement in the rank of major, and that his retired pay would be recomputed for his retirement on 1 Dec 21 in the rank of lieutenant colonel. However, the applicant contends that the AFBCMR had no statutory authority to correct his records to show he consented to continuation and that he would have refused continuation if denied an active duty promotion to the rank of lieutenant colonel. In this respect, given the applicant does not consent to continuation and the Board does not recommend his name be added to a lieutenant colonel promotion list or that he be considered for promotion to lieutenant colonel by an SSB, the Board recommends the AFBCMR Directive dated 6 Feb 22 be rescinded in accordance with AFBCMR procedures. However, should the applicant wish to have his records corrected to show he was continued on active duty on 1 Dec 11, he may do so by notifying the Board within 180 days from the date of this decision. If the applicant accepts continuation, the applicant should also inform the Board if he concurs with reinstatement and retirement from active duty in the rank of major with 20 years of service. The applicant also contends the AFBCMR violated 10 U.S.C. § 628(a)(1) by not convening SSBs and that it was "possible" he would have been promoted to the rank of lieutenant colonel and retained beyond the date for required retirement as a continued major. The Board finds "possible" is not preponderance of the evidence, nor does "possible" meet the more likely than not standard. The applicant was already not selected for promotion to lieutenant colonel by two active duty lieutenant colonel CSBs. Although the applicant was selected for promotion to lieutenant colonel by a Reserve CSB, the active duty and Reserve promotion boards are two different competitive settings. Consequently, the Board finds no evidence to show he would have eventually been selected for promotion to lieutenant colonel by an active duty CSB or that his Reserve promotion to lieutenant colonel entitles him to an active duty promotion. Further, the applicant refuses to not consent to continuation; therefore, the Board finds no basis to grant the SSB as requested. Accordingly, the Board finds no evidence the AFBCMR violated 10 U.S.C. § 628(a)(1) by not convening SSBs. The applicant also contends there would be material flaws and he would not receive a fair opportunity at an SSB and that the Board should grant him an active duty lieutenant colonel promotion based on his selection for promotion by a Reserve CSB. However, as stated, the Board does not find his promotion to lieutenant colonel in the Air Force Reserve sufficient to grant his request. Additionally, the applicant contends the Board deviated from precedent in not recommending he receive a direct promotion to the rank of lieutenant colonel or grant him SSB; however, the Board disagrees. In this respect, the Board finds no similarities between his case and the applicants in the cited cases. In BC-2004-03840, the recommendation for an SSB was due to the recommendation for removal of a contested OPR and PRF. The applicant in this case did not have any OPR or PRF removed. With respect to the applicant in BC-2006-00134, there was evidence he was denied equal protection rights and accordingly was granted an SSB. However, his request for a direct promotion was denied. Moreover, while the Board considers similarly situated applicants similarly, each case is based on its individual merits and evidence in the case. Therefore, the Board recommends against correcting the applicant's records to show promotion to lieutenant colonel. However, because the applicant is the victim of an error or injustice with respect to continuation only - not any promotion or SSBs as claimed - the AFBCMR is extending the applicant the option to provide

consent for continuation in the rank of major. This opportunity for consent will remain open for 180 days from the date of the notification letter signed by the Director, Air Force Review Boards Agency.

RECOMMENDATION

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice to warrant relief beyond continuation. The Board's prior correction granting selective continuation is rescinded and the Board's offer of selective continuation in the rank of major effective 1 Dec 11 shall remain open for 180 days. 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-2021-02470-2 in Executive Session on 2 Feb 23:

, Chair, AFBCMR
, Panel Member
, Panel Member

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

Exhibit E: Record of Proceedings, w/ Exhibits A-D, dated 1 Feb 22.
Exhibit F: Application, DD Form 149, w/atchs, dated 4 Apr 22.
Exhibit G: Documentary evidence, including relevant excerpts from official records.
Exhibit H: Advisory Opinion, AFPC/DP2SP, undated.
Exhibit I: Notification of Advisory, SAF/MRBC to Applicant, dated 14 Nov 22.
Exhibit J: Applicant's Response, dated 11 Dec 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.