

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2022-00024

XXXXXXXXXXXXXXXXXX

**COUNSEL:** NONE

**HEARING REQUESTED:** YES

### APPLICANT'S REQUEST

He be considered by a special board (SB) for selective continuation by the CY11A Major Selective Continuation Board.

### APPLICANT'S CONTENTIONS

He requests a proper continuation board be conducted in accordance with DODI 1320.08, *Continuation of Commissioned Officers on Active Duty and on the Reserve Active Status List*, and the Court of Appeals for the Federal Circuit (CoAFC) decision in *Baude v. United States*. The Secretary of the Air Force (SecAF) exceeded his authority in his instructions to the continuation board that majors who will qualify for retirement within five years would be continued rather than six years. The CoAFC directed the Air Force to convene a SB for the plaintiff but that as a non-attorney he could not assert his rights on behalf of others. It was the same SecAF memorandum of instructions (MOI) that resulted in his nonselection for continuation and involuntary separation.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

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

On 30 Nov 11, the applicant was honorably discharged from the Regular Air Force in the rank of major (O-4) with a narrative reason for separation of "Non-selection, Permanent Promotion." He was credited with 15 years, 5 months and 11 days of active duty service.

On 1 Dec 11, the applicant was appointed a major in the Reserve of the Air Force and was promoted to lieutenant colonel with date of rank (DOR) and a 1 Oct 17, effective date of promotion.

On 29 Nov 21, ARPC/DPTT informed the applicant of his notification of eligibility for Reserve Retired Pay at age 60 (20-year letter).

For more information, see the excerpt of the applicant's record at Exhibit B and the advisory at Exhibit C.

## 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 six years of qualifying for a length of service retirement; however, the SecAF's modified MOI to the board narrowed the window for continuation to officers within five years of retirement instead of six 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 re-write 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 six 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 discharge the officer involuntarily. In this case, there were no unusual circumstances. The plaintiff's case was remanded to the AFBCMR to convene a SB for selective continuation with a process consistent with DODI 1320.08. On 23 Nov 20, the CoAFC informed the AFBCMR of the Order. Per the CoAFC order, the plaintiff's case was not reconsidered by the AFBCMR but instead the Air Force convened an SB on 25 Mar 21 for the CY11A Major Selective Continuation Board.

The CY21A Selective Continuation SB convened on 25 Mar 21. The 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. § 1370, Retirement in Highest Grade in Which Served Satisfactorily. Unless entitled to a different retired grade under some other provision of law, a commissioned officer of the Air Force who retires under any provision of law other than chapter 61 or 1223 shall be retired in the highest permanent grade.

10 U.S.C. § 1558(c)(3)(A), If an involuntarily board separated person in paragraph (1) does not consent to restoration of status, rights and entitlements under paragraph (2), the Secretary concerned shall pay that person back pay and allowances (less appropriate offsets) and shall provide that person service credit.

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/JA states if the AFBCMR believes the principles articulated in *Baude v. United States* apply to the applicant's case, the Board may grant his request and direct he meet another selective continuation board utilizing the standard of six years from retirement vice five years. If on the other hand, the AFBCMR does not believe the principles articulated in *Baude v. United States* apply, they may deny his request for relief.

The applicant is one of 157 majors who met and was not selected for continuation by the CY11A Major Selective Continuation Board. This followed the second nonselection for promotion to lieutenant colonel by the CY11A Lieutenant Colonel Line of the Air Force (LAF) Central Selection Board (CSB). Therefore, he was separated from the Air Force on 30 Nov 11. The applicant is requesting SB consideration in light of the CoAFC ruling in *Baude v. United States*. Specifically, the applicant requests to meet another SB utilizing the standard of six years from retirement vice five years.

In 2013, most of the 157 majors not selected for continuation by the CY11A Major LAF Selective Continuation Board filed for relief through the AFBCMR. The Air Force position at that time was that SecAF's decision to modify the selective continuation window from within six years of retirement to five 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 in the CoFC. In Apr 18, that court issued its opinion, confirming the AFBCMR's decisions to deny relief. The court ruled SecAF possessed the discretion to alter the continuation requirements and did so lawfully. Thereafter, one applicant appealed on behalf of himself and the other applicants to the CoAFC. In Apr 20, that court issued its opinion (*Baude v. United States*), rejecting the AFBCMR's decisions to deny relief. The court ruled the SecAF did not possess the discretion to alter the continuation requirements and thus, the court sent the case back to the AFBCMR, with instructions to convene an SB for reconsideration of the plaintiff's non-continuation, utilizing the standard of six years from retirement vice five years.

The CoAFC in *Baude v. United States* specifically limited its opinion to the plaintiff because as a non-attorney, he 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. With the plaintiff, the AFBCMR had no choice but to convene a SB for reconsideration of his noncontinuation. With the applicant, the AFBCMR has a choice.

The complete advisory opinion is at Exhibit C.

## **APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 6 Jul 22 for comment (Exhibit D), but has received no response.

## **FINDINGS AND CONCLUSION**

1. The application was not timely filed, but it is in the interest of justice to excuse the delay.
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. Therefore, the Board recommends correcting the applicant's records as indicated below.
4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

## **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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2022-00024 in Executive Session on 3 Nov 22:

, Chair, AFBCMR  
, Panel Member  
, Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 3 Jan 22.

Exhibit B: Documentary evidence, including relevant excerpts from official records.

Exhibit C: Advisory opinion, AFPC/JA, dated 5 May 22.

Exhibit D: Notification of advisory, SAF/MRBC to applicant, dated 6 Jul 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9.

X

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Board Operations Manager, AFBCMR