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

### ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-00024-2

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COUNSEL: NONE

HEARING REQUESTED: NO

### APPLICANT'S REQUEST

The Board reconsider his request for the following:

1. His discharge from active duty on 30 Nov 11 be rescinded.
2. He was continued to serve on active duty until he qualified for retirement as an officer and he be retired the first day of the following month.
3. He be issued a new DD Form 214, *Certificate of Release or Discharge from Active Duty*, to reflect the new dates.
4. He be provided all back pay and entitlements for the correction of his records per his selection for continuation.

### RESUME OF THE CASE

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

On 30 Nov 11, he was honorably discharged from the Regular Air Force in the grade of 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.

The applicant was commissioned in the Air Force Reserve following his discharge from active duty. He was promoted to the grade of O-5 on 1 Oct 17 and placed on the Retired Reserve list effective 14 Sep 22 (awaiting retired pay upon reaching eligibility age).

On 3 Nov 22, the Board considered and granted the applicant's request he be considered by a special board (SB) for the CY11A Selective Continuation Board. The Court of Appeals for the Federal Circuit (CoAFC) directed the plaintiff in *Baude v United States* be considered by a SB for selective continuation. The CoAFC concluded the Secretary of the Air Force (SECAF) violated DoDI 1320.08, *Continuation of Commissioned Officers on Active Duty and on the Reserve Active Status List*, in narrowing the continuation window from within six years of retirement to within five years of retirement. The Board concluded the applicant was similarly situated as the applicant in *Baude v United States* and granted his request for SB consideration for the CY11A Major Selective Continuation Board.

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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 24, the AFBCMR provided the applicant the AFPC/DPMSPP notification of selection for continuation by the CY11A Major Special Board, which convened on 30 Oct 23.

On 5 Apr 24, 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 he qualified for retirement as an officer (20 years active military service and 10 years active commissioned service).

On 8 Apr 24, the applicant requested reconsideration of his request for reinstatement on active duty and he be retired from active duty with a 20 year service retirement in the grade of O-4.

The applicant's complete submission is at Exhibit F.

#### **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/DPMSR (Military Retirements) recommends approval and provides an advisory for the request to change a Reserve retirement to an active duty retirement. 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 as a commissioned officer.

Prior to 1 Jan 21, 10 U.S.C. § 1370 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.

Prior to 1 Jan 21, to be eligible for voluntary retirement, 10 U.S.C. § 1370(b)(1) required officers in grade of O-5 and above to serve on active duty in that grade for a period of not less than three years. If the member did not serve on active duty in the higher Reserve grade, the retired grade would be established in accordance with the legislative requirement.

For calculation of service dates for applicants who elected to serve in the Reserve component after separation from active duty and may have attained additional active duty service to qualify and be approved for a Reserve retirement, ARPC must cancel the projected Reserve retirement before AFPC Retirements can approve the active duty length of service retirement.

Should the Board grant the request, the record would be corrected to show the applicant was not separated but continued on active duty to the last day of the month in which the applicant reached minimum retirement eligibility, the applicant's Reserve retirement was not approved and that he was retired in the grade of O-4 the first day of the month in which the officer reached minimum retirement eligibility.

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.

The complete advisory opinion is at Exhibit I.

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

The complete advisory opinion is at Exhibit J.

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

The Board sent copies of the advisory opinions to the applicant on 21 Apr 24 for comment (Exhibit K), and the applicant replied on 22 Apr 24. He states, even though he has an approved Reserve retirement, he is not asking the Air Force for that. He is happy with a backdated active duty retirement in the grade of O-4.

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 concurs with the rationale and recommendations of AFPC/DPMSSR and DFAS and finds a preponderance of the evidence substantiates the applicant's contentions. The applicant was selected for continuation by the SB for the CY11A Major Selective Continuation Board, signed the Statement of Acceptance for Selective Continuation and requested cancellation of his Reserve retirement in the grade of O-5, which is sufficient for the Board to recommend the applicant be reinstated in the grade of O-4 and continued to 20 years of service for retirement effective 1 Jul 16, in the grade of O-4. 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-5, effective 14 Sep 22 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 16.

- c. He was retired from active duty in the grade of O-4, effective 1 Jul 16.

## 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-2022-00024-2 in Executive Session on 30 May 24:

Work-Product Panel Chair  
Work-Product Panel Member  
Work-Product Panel Member

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

- Exhibit E: Record of Proceedings, w/ Exhibits A-D, dated 16 Nov 22.
- Exhibit F: Application, DD Form 149, dated 8 Apr 24.
- Exhibit G: Documentary evidence, including relevant excerpts from official records.
- Exhibit H: Notification of Selective Continuation, SAF/MRBC, w/atchs, dated 4 Apr 24.
- Exhibit I: Advisory Opinion, AFPC/DPMSSR, dated 27 Oct 23.
- Exhibit J: DFAS Information, undated.
- Exhibit K: Notification of Advisory, SAF/MRBC to Applicant,, dated 21 Apr 24.
- Exhibit L: Applicant's Response, dated 22 Apr 24.

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.

7/19/2024

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Board Operations Manager, AFBCMR  
Signed by: USAF