



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-01065-2

Work-Product

(DECEASED)

COUNSEL:

Work-Product

Work-Product

(APPLICANT)

HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Board reconsider the following corrections to the deceased service member's records:

1. He be restored to active duty, with back pay.
2. He be granted an active duty retirement.
3. He be provided any other relief he may be entitled to receive.

RESUME OF THE CASE

The applicant is the brother of the deceased former Air Force major (O-4).

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 15 days of active duty service.

On 11 Jun 19, the former service member and his spouse divorced. There is no Survivor Benefit Plan (SBP) election for spouse or children coverage under 10 U.S.C. § 1450 as the former service member at the time of his discharge was not eligible to enroll in the SBP.

On 9 Apr 20, the Court of Appeals for the Federal Circuit (CoAFC) reversed the Court of Federal Claims (CoFC) decision and ruled the SecAF lacked the authority to modify DoDI 1320.08, *Continuation of Commissioned Officers on Active Duty and on the Reserve Active Status List*, by narrowing the continuation window from within six years to within five years of retirement for the CY11A Major Selective Continuation Board. On 23 Oct 20, the CoAFC ordered the Air Force to consider the plaintiff in *Baude v. United States* for continuation. On 25 Mar 21, the Air Force convened a special board (SB) for the plaintiff. Because the plaintiff in *Baude v. United States* was not an attorney and could only represent himself, the CoAFC ruled only on behalf of the plaintiff.

On 2 Mar 22, the former service member, through counsel, requested he be considered by an SB for continuation, he receive back pay, entitlements, retirement benefits and he be reimbursed attorney fees. On 3 Nov 22, the Board considered and partially granted his request. The Board found he was similarly situated to the plaintiff in *Baude v. United States* and granted the request

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Controlled by: SAF/MRB

CUI Categories: Work-Product

Limited Dissemination Control: N/A

POC: SAF.MRBC.Workflow@us.af.mil

he be considered by an SB for the CY11A Selective Continuation Board. However, the Board denied the request for reinstatement, retirement and back pay finding the requests were not ripe for adjudication by the Board at the time. In this respect, the Board noted he would have to first be selected for continuation and if selected, accept or decline continuation in accordance with DAFI 36-2501, *Officer Promotions and Selective Continuation*. The Board also noted it was without authority to pay expenses of any kind incurred, to include attorney fees, in connection with a request for correction of military records.

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.

Per the state issued death certificate, the former service member died on [Work-Product]. The Board was not aware of the former service member's death at the time the Board considered the applicant's prior case.

As directed by SAF/MRB, the former service member was considered by an SB for the CY11A Major Selective Continuation Board, and he was selected for continuation. On 10 Apr 24, the applicant (on behalf of the deceased former service member) signed the Statement of Acceptance for Initial Selective Continuation of Majors with Less than 18 Years Active Federal Military Service, Board [Work-Product].

On 12 Apr 24, the applicant, through counsel, requested reconsideration of the request for the former service member's reinstatement on active duty, he be retired from active duty, and he receive any other benefits and entitlements due to him. His discharge was wrongful and due to the SecAF's supplemental instructions to the promotion board, which violated DoDI 1320.08. Counsel also stated any clients who earned a grade higher than O-4 were in no way waiving the rank attained. The former service member's records do not reflect he earned any higher promotion through service in the Air Force Reserve or the Air National Guard. In an additional submission, counsel provided birth certificates, divorce decree, death certificate and the court order appointing the applicant as the administrator of the deceased service member's estate.

The applicant's complete submission is at Exhibit G.

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.

DoD 7000.14-R, *Financial Management Regulation*, Volume 7B, paragraph 540402. A member electing to participate must designate an immediate election, a deferred election, or indicate a decision to delay the election until reaching retirement age. These are described as Options A, B, or C.

AIR FORCE EVALUATION

AFPC/DPMSSR (Military Retirements) recommends approval. When an officer is selected for continuation by an 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 require 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.

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 former service member was not separated but continued on active duty to the last day of the month in which the former service member 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 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 counsel on 28 May 24 for comment (Exhibit K) but has received no response.

AIR FORCE EVALUATION

AFPC/DPFC (Casualty Matters Division) recommends approval for the deceased former service member's record to be corrected to reflect coverage for children only SBP coverage at full gross pay.

With the implementation of the AFBCMR directive, dated 17 May 23 for BC-2022-01065, the deceased former service member would have been eligible for an SBP election. He passed away on **Work-Product**. The Department of Defense (DoD) Person Search reflects the former service member was divorced from his spouse. At the time of his death, his three children were his only eligible beneficiaries. Therefore, they will make a children only election on behalf of the former service member. To assist his family with completing required documents to establish an annuity for the children, a Casualty Assistant Representative will be assigned to contact the applicant who is the administrator of the estate for the former service member upon issuance of an AFBCMR directive.

The complete advisory opinion is at Exhibit L.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to counsel on 14 Nov 24 for comment (Exhibit M) but has received no response.

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 deceased former service member is the victim of an error or injustice. The Board concurs with the rationale and recommendations of AFPC/DPMSSR, DFAS and AFPC/DPFC and finds a preponderance of the evidence substantiates the applicant's contentions. The deceased former service member's record was corrected to show he was selected for continuation by the SB for the CY11A Major Selective Continuation Board, which is sufficient for the Board to recommend the deceased former service member's record be corrected to reflect he was retired in the grade of O-4 with 20 years of active duty service, effective 1 Jul 16. The Board also notes the correction of his record to reflect a 20 year retirement in the grade of O-4 would make him eligible to make an SBP election. However, due to his untimely death, an SBP election is not possible. Accordingly, in the interest of justice, the Board recommends his records be corrected to reflect a child(ren) only election as his children were his only beneficiaries at the time of his death on [Work-Product]. 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 DECEASED be corrected to show:

- a. 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.
- b. He was retired from active duty in the grade of O-4, effective 1 Jul 16.
- c. On 30 Jun 16, he submitted a timely and effective election for child(ren) only coverage under the SBP, based on the previous full level of retired pay, naming his eligible child(ren) as the eligible beneficiaries.
- d. Approval should be contingent upon recovery of SBP premiums. If applicable, the monthly survivor benefit annuity will be applied to the premium debt until the total amount of premiums owed is recovered.

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-2022-01065-2 in Executive Session on 19 Dec 24:

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

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

- Exhibit F: Record of Proceedings, w/ Exhibits A-E, dated 9 Mar 23
- Exhibit G: Application, DD Form 149, w/atchs, dated 25 Apr 24.
- Exhibit H: Documentary evidence, including relevant excerpts from official records.
- Exhibit I: Advisory Opinion, AFPC/DPMSSR, dated 27 Oct 23.
- Exhibit J: Advisory Opinion, DFAS, undated.
- Exhibit K: Notification of Advisory, SAF/MRBC to Applicant, dated 24 May 24.
- Exhibit L: Advisory Opinion, AFPC/DPFC, dated 5 Nov 24.
- Exhibit M: Notification of Advisory, SAF/MRBC to Applicant, dated 14 Nov 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.

2/4/2025

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Board Operations Manager, AFBCMR

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