



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-01114-2

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Board reconsider his request for the following:

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.
4. His promotions to the grade of lieutenant colonel (O-5) and colonel (O-6) in the Air National Guard (ANG) be recognized in his active duty retirement.

RESUME OF THE CASE

The applicant is a former Regular Air Force (RegAF) major (O-4) and retired Air Force colonel (O-6).

On 30 Nov 11, he was honorably discharged from the RegAF in the grade of O-4 with a narrative reason for separation of "Non-Selection, Permanent Promotion." He was credited with 15 years, 6 months and 2 days of active duty service.

On 1 Dec 11, the applicant was granted Federal recognition and appointed in the ANG in the grade of O-4.

He was extended Federal recognition and promoted in the Reserve of the Air Force to the grade of O-5 with date of rank (DOR) and effective date 1 May 13. He was subsequently promoted to the grade of O-6 with DOR and effective date 7 Oct 19.

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.

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On 3 Nov 22, the Board considered and partially granted the applicant's request. The Board found the applicant similarly situated to the plaintiff in *Baude v. United States* and granted the request he be considered by an SB for the CY11A Selective Continuation Board. However, the Board denied the applicant's 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 the applicant 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 Reserve Order **Work-Product** dated 23 May 22, the applicant was discharged from the ANG and placed on the Air Force Retired List in the grade of O-6 effective 1 Jan 23.

As directed by SAF/MRB, the applicant was considered by an SB for the CY11A Major Selective Continuation Board, and he was selected for continuation. On 9 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 **Work-Product**. 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 15 May 24, the applicant, through counsel, requested reconsideration of his request for 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 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.

10 U.S.C. § 624(a)(3)(E), Promotions: How Made: If the Secretary of the military department concerned determines that one or more officers were not placed on an all fully qualified list because of an administrative error, the Secretary may prepare a supplemental all fully qualified officers list containing the names of any such officers for approval.

10 U.S.C. § 624(c), Appointments under this section shall be made by the President, by and with the advice and consent of the Senate, except appointments in the grade of first lieutenant through captain for officers in the Army, Air Force, Marine Corps or Space Force or lieutenant (junior grade) or lieutenant in the case of officers of the Navy, shall be made by the President alone.

10 U.S.C. § 1370(a)(1), Retirement in Highest Grade in Which Served Satisfactorily. In general, unless entitled to a different retired grade under some other provision of law, a commissioned officer who retires under any provision of law other than chapter 61 or 1223 shall be retired in the highest permanent grade in which such officer is determined to have served on active duty satisfactorily.

10 U.S.C. § 1370(f), Finality of Retired Grade Determination. (1) In general, except for a determination authorized by subsection (d) a determination of the retired grade of an officer pursuant to this section is administratively final on the day the officer is retired and may not be reopened, except as provided in paragraph (2), Reopening, a final determination of the retired grade of an officer may be reopened as follows: (A) If the retirement or retired grade of the officer was procured by fraud. (B) If substantial evidence comes to light after the retirement that could have led to a determination of a different retired grade under this section if known by competent authority at the time of retirement.

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 paragraph (3) if the person, as a result of a correction of the person's military records under subsection (a) becomes entitled to retention on or restoration to active duty or to active status in a Reserve component. 10 U.S.C. § 1558(c)(2) (A), A person referred to in paragraph (1) shall, with that person's consent be restored to the same status, rights and entitlements (less appropriate offsets against back pay and allowances as the person would have had if the person had not been selected to be involuntarily board separated. 10 U.S.C. § 1558(c)(2) (B), Nothing in subparagraph (A) may be construed to permit a person to be on active duty or in an active status in a Reserve component after the date on which the person would have been separated, retired or transferred to the Retired Reserve or to inactive status in a Reserve component if the person had not been selected to be involuntarily board separated in an action of a selection board the record of which is corrected.

10 U.S.C. § 1558(c)(3), If an involuntarily board separated person does not consent to a 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 for the period. Per 10 U.S.C. § 1558(c)(3)(B) (ii), The date on which the person would otherwise have been separated, retired or transferred to the Retired Reserve.

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 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 Plan (SBP) deductions. Each case is settled on the individual circumstances and the settlements are complex.

The complete advisory opinion is at Exhibit J.

AFPC/DPMSP (Officer Promotions) recommends approval for continuation on active duty until his mandatory date of separation based on his total active military service commission date and his transfer date to the Air Force Reserve be adjusted to reflect after his retirement from active duty.

AFPC/DPMSP recommends denial for an active duty promotion to his promoted grade in the ANG. The type of request specifically covers the applicant's total active military service considering the highest rank held while in the RegAF. The AFBCMR has no authority to grant the applicant a promotion per 10 U.S.C. § 624 which requires Senate approval.

The complete advisory opinion is at Exhibit K.

ARPC/DPTT (Operations Division) recommends denial. There is no evidence of an error or injustice while the applicant was assigned to the ANG. The applicant successfully served in the ANG and met the requirement for a regular retirement in the grade of O-6, which means he is eligible for immediate pay and benefits. By accepting selective continuation, the applicant's appointment into the ANG, his Reserve promotions to the grades of O-5 and O-6 and his retirement order for 1 Jan 23 should be rescinded. Given the drastic change in status, there is no possible way to predict if the applicant would have joined the Air Force Reserve if given the opportunity for retirement eligibility in the grade of O-4 from the Air Force in 2016. The Board can direct ARPC to update the applicant's service history with active duty participation from the date separated through his 20 year total federal commission service date.

The other course of action would be for the Board to direct ARPC to update the applicant's service history with active duty participation from the date separated from the RegAF through his 20 year total federal commission service date (TFCSD). The Board could direct ARPC to amend the retirement order with the updated years of service for retired pay.

The complete advisory opinion is at Exhibit L.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 2 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 applicant is the victim of an error or injustice. The Board concurs with the rationale and recommendations of AFPC/DPMSSR, DFAS, AFPC/DPMSP and ARPC/DPTT in part; and finds a preponderance of the evidence substantiates the applicant's contentions in part. Specifically, the applicant was selected for continuation by the SB for the CY11A Major Selective Continuation Board and on 9 Apr 24, he signed the Statement of Acceptance for Selective Continuation, 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 Jun 16, in the grade of O-4. 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. Per counsel's letter dated 12 Apr 24, the applicant requests his ANG promotions to the grades of O-5 and O-6 be recognized and he be granted an active duty retirement in the grade of O-5. However, the Board finds the applicant's request would result in a windfall that the applicant is not entitled to and he is asking the Board to be put in a better position than he would have been but for the error. Had the Air Force not erred in discharging him in 2011 for his twice promotion deferral to the grade of O-5, it is more likely than not he would have retired from active duty in the grade of O-4 and not O-5 or O-6. However, on account of the Air Force's error, he joined the ANG, attained the grade of O-6 and qualified for retirement in the grade of O-6. While the applicant believes he would have been selected for promotion to the grade of O-5 and O-6 had he not been discharged, the Board disagrees. The applicant was already considered by two active duty O-5 promotion boards and was not selected. Although the applicant was selected for promotion to the grade of O-6 in the ANG, the active duty and ANG promotion boards are two different competitive settings. Accordingly, the Board finds no evidence to show he would have eventually been selected for promotion to the grade of O-5 or O-6 on active duty or that his ANG promotion to the grade of O-6 entitles him to an active duty promotion.

The Board does not intentionally correct records resulting in harm to applicants. It is not possible for the Board to know the ultimate impact on the applicant as to which is better for him personally, continuation on active duty with a 20 year service retirement in the grade of O-4, effective 1 Jun 16 or retirement in the grade of O-6, effective 1 Jan 23. However, because the applicant is the victim of an error or injustice with respect to continuation only, not any promotion as claimed, the AFBCMR is extending the applicant the option to consent for reinstatement and continuation in the grade of O-4, with retirement effective 1 Jun 16 in the grade of O-4. This opportunity will remain open for 180 days from the date of the notification letter signed by the Director, Air Force Review Boards Agency. The applicant is made aware that should he accept reinstatement and continuation on active duty with a 20 year service retirement effective 1 Jun 16, ARPC will cancel his retirement in the grade of O-6. Therefore, the Board recommends against correcting the applicant's records to show promotion the grade of O-6. However, because the applicant is the victim of an error or injustice with respect to continuation only - not any promotion as claimed - the AFBCMR is extending the applicant the option to provide consent for continuation in the grade of O-4. 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 reinstatement and continuation in the grade of O-4, with

retirement effective 1 Jun 16 in the grade of O-4. The applicant's opportunity to accept reinstatement and continuation on active duty in the grade of O-4, with an active duty retirement effective 1 Jun 16 shall remain open for 180 days.

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-2022-01114-2 in Executive Session on 23 Jan 25:

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| 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 F: Record of Proceedings, w/ Exhibits A-E, dated 13 Mar 23.
- Exhibit G: Application, DD Form 149, w/atchs, dated 15 May 25.
- 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: Advisory Opinion, AFPC/DPMSP, dated 11 Jul 24.
- Exhibit L: Advisory Opinion, ARPC/DPTT, w/atchs, dated 28 Oct 24.
- Exhibit M: Notification of Advisory, SAF/MRBC to Applicant,, dated 2 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.

2/11/2025

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Board Operations Manager, AFBCMR

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