



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03028

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. He be considered by a special board (SB) for selective continuation for the CY11A Major Selective Continuation Board.
2. If selected for continuation, he receive a direct promotion to the grade of lieutenant colonel (O-5).
3. In the alternative, he be considered by a special selection board (SSB) to determine if he would have been promoted to the grade of O-5 during the continuation period.
4. If he is not selected for promotion to the grade of O-5 by an SSB, the Board determine if he received fair and equitable promotion consideration.
5. He be reinstated onto active duty and his entitlement to retirement be restored; and he receive all back pay and allowances, less appropriate offsets.
6. He receive three years of constructive service credit (CSC) if he is promoted to the grade of O-5 and the period be considered satisfactory service for retirement in the grade of O-5.
7. The AFBCMR give him the option of returning to active duty in the grade of O-5 or elect voluntary retirement if he consents to continuation.
8. If promoted to the grade of O-5 and reinstated onto active duty, the AFBCMR direct any promotion nonselections for promotion to the grade of colonel (O-6) be set aside until such time as he has had at least three officer performance reports (OPR) rendered with at least 250 days supervision in the grade of O-5.
9. The AFBCMR notify the Defense Finance and Accounting Service (DFAS) upon his selection and consenting or nonconsenting to continuation and action be taken to ensure retired pay is initiated.

APPLICANT'S CONTENTIONS

He was considered but not selected for continuation by the CY11A Major Selective Continuation Board and was involuntarily discharged. The Court of Appeals for the Federal Circuit (CoAFC), in *Baude v United States*, determined 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*, when he narrowed the window for continuation. On 6 Dec 10, the SecAF notified the Under Secretary of Defense for Personnel and Readiness (USD P&R), he intended to suspend selective

AFBCMR Docket Number BC-2023-03028

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continuation from within six years from retirement to five years from retirement as part of the Air Force's continuing efforts to manage its officers corps end strength. The CoAFC ordered the plaintiff in *Baude v United States* be considered by an SB for the CY11A Major Selective Continuation Board. He requests changes be made to the SecAF's Memorandum of Instruction (MOI) to the SB and he receive fair consideration.

If he had been continued, he would have been eligible to meet promotion boards for promotion to the grade of O-5. It is doubtful any SSBs can provide fair and equitable results because he will have no active duty OPRs, promotion recommendation forms (PRF) or duty history for the continuation period. He requests he be provided fitting relief for the gap in his records.

In BC-2002-00938, the AFBCMR granted the applicant a retroactive promotion to the grade of O-4 because of a flawed record when he was reinstated in 1997 after his discharge in 1992. Justification for providing him with a direct promotion is consistent with the decision in BC-2002-00938. The AFBCMR has also granted promotion selections for officers who had a gap in records. In BC-2012-03759, the AFBCMR recommended any nonselections for promotion to the grade of O-4 prior to his having three OPRs to be set aside.

The AFBCMR may be advised that he should not be granted a promotion to the grade of O-5 based on promotion statistics for above-the-zone (APZ) majors or due to his prior active duty nonselections for promotion to lieutenant colonel. In *Timothy R. Quinton v United States*, the Court of Federal Claims (CoFC) concluded the Coast Guard BCMR's reliance on a previous failure of selection for determination was arbitrary in the decision to deny promotion.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force major (O-4).

On 30 Nov 11, the applicant 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 and 5 months of active duty service.

The applicant cites BC-2002-00938 as precedent to grant relief. The applicant in this case contended through no fault of his own, he had to compete for promotion with an abbreviated record. The applicant was discharged in the grade of captain (O-3) after two nonselections for promotion in Feb 92. It was later determined his nonselections were erroneous because his record was flawed. His records were then considered by an SSB and on 18 Nov 96 he was selected for promotion to the grade of O-4 and reinstated on active duty. The Board found the applicant was considered and nonselected for promotion before he had an opportunity to establish a record in the grade of O-4. The Board found the applicant's case so exceptional that an SSB could not reach a fair decision and the extraordinary solution of a directed promotion was warranted. On 22 Jul 03, the Board corrected the applicant's record to show he was selected to the grade of O-5 by the CY1994A Lieutenant Colonel Central Selection Board (CSB), and that action be initiated to obtain Senate Confirmation. The Board also directed he receive a date of rank (DOR) as though he would have been selected by the CSB and he be retired in the grade of O-5 effective 1 Sep 99.

The applicant cites BC-2012-03759 as precedent to grant relief. The applicant in this case contended he was discharged due to nonselection by the CY11 Reduction in Force (RIF) Board. Due to a correction in his records, he met a reduction in force (RIF) SSB and was subsequently selected for retention. On 9 Apr 12, the Board granted the applicant's request to show he was not released from active duty on 1 Mar 12 but continued to serve on active duty and that any

nonselections for promotion to the grade of O-4 prior to having three OPRs on file closing out after 1 Mar 12 be set aside.

The applicant cites the CoFC decision in *Quinton v United States*. The plaintiff in 1995 had a 1991 officer evaluation report (OER) removed. In 2003, he examined his records and noticed the 1991 OER removed was still in his electronic records. On 21 Jan 03, the plaintiff applied to the Coast Guard BCMR for set aside of the promotion nonselections, he be reinstated to active duty and he be given two additional promotion opportunities. The Coast Guard denied the applicant's request for an SSB citing the promotion board reviewed paper records and the OER was not included. The Coast Guard further contended that had the 1991 OER not been in his electronic records, it was still unlikely he would have been promoted. The remedy included his nonselection for failure of promotion in 1999 be set aside, he be removed from the retired list and be restored to the active duty promotion.

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

APPLICABLE AUTHORITY

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 memorandum of instruction (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 rewrite 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 an 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 Memorandum of Instruction (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. § 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.

Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 7.2.4. Payment of Expenses. The Air Force has no authority to pay expenses of any kind incurred by or on behalf of an applicant in connection with a correction of military records under 10 U.S.C. §1034 or 1552.

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 were 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). As a consequence, 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 an SB for reconsideration of his non-continuation. 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 18 Jan 24 for comment (Exhibit D), and the applicant replied on 22 Jan 24. In his response, the applicant contends although the AFBCMR is not bound by a court order to consider his application for a special board, he provided the CoAFC opinion in *Baude*. The similarity of cases should be determined based upon the facts regarding the underlying error or injustice. A court order is not necessary for the AFBCMR to exercise its mandate. The underlying error is the same as it was for him and the plaintiff in *Baude v. United States*. They both met the CY11A Major Selective Continuation Board and the CoAFC concluded the SecAF's instructions to the board violated DODI 1320.08. Accordingly, the AFBCMR may and should grant his request for a SB that utilizes the standard of six years from retirement.

The applicant's complete response, with attachments, is at Exhibit E.

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 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. 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. In this respect, the applicant's request for associated back pay, retirement benefits, promotion and other entitlements is dependent on the results of the SB and the applicant's acceptance for continuation should he be selected by the SB. Accordingly, other than the request for SB consideration for the CY11A Major Selective Continuation Board, the Board finds the remaining requests are not ripe for adjudication by the Board at this time. Moreover, the Board finds the recommended correction of the applicant's record at this time is proper, fitting and in accordance with the CoAFC ruling in

Baude v. United States ordering the plaintiff be considered for an SB for continuation in the grade of O-4. 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 language for the SB be as follows: Majors who will qualify for retirement within six years of the date of Continuation (1 Dec 11) shall normally be continued. It will normally be in the best interest of the Air Force to continue officers with critical skills. I have 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).

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 DAFI 36-2603, paragraph 2.1, considered Docket Number BC-2023-03028 in Executive Session on 29 Feb 24:

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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 A: Application, DD Form 149, w/atchs, dated 16 Sep 23.
- 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 18 Jan 24.
- Exhibit E: Applicant's response, dated 22 Jan 24.

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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.

5/17/2024

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Board Operations Manager, AFBCMR
Signed by: USAF

AFBCMR Docket Number BC-2023-03028

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